Calendar No. 782

100th Congress *2d Session*	SENATE	REPORT 100-413

WHISTLEBLOWER PROTECTION ACT OF 1988

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 508

TO AMEND TITLE 5, UNITED STATES CODE, TO STRENGTHEN THE PROTECTIONS AVAILABLE TO FEDERAL EMPLOYEES AGAINST PROHIBITED PERSONNEL PRACTICES, AND FOR OTHER PURPOSES

JULY 6, 1988.—Ordered to be printed

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JULY 6, 1988.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 508]

The Committee on Governmental Affairs, to which was referred the bill (S. 508) to amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends the bill, as amended, do pass.

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I. SUMMARY AND PURPOSE

The purpose of S. 508 is to improve the protections for federal employees who disclose, or "blow the whistle" on, government mismanagement or fraud. The bill accomplishes this in several ways. It strengthens the Office of Special Counsel (OSC or Special Counsel), which is currently part of the Merit Systems Protection Board (MSPB or Board), by making it a separate federal agency and granting it litigating authority. The bill seeks to enhance employees' confidence in the OSC by specifically directing that office to

protect whistleblowers and by guaranteeing certain confidential communications between the OSC and employees seeking the OSC's assistance.

In addition, the bill allows employees alleging reprisal for whistleblowing to seek a MSPB hearing on their own if the OSC does not agree to proceed with their case within 90 days. The bill also reduces some of the legal obstacles whistleblowers must overcome in order to win cases alleging reprisal.

The bill makes a number of other changes to current law, including providing for payment of attorney fees to employees who succeed in showing that a prohibited personnel practice was taken against them, expanding the definition of prohibited personnel practices, and by providing successful whistleblowers with a preference in seeking transfers to other fedral jobs.

II. BACKGROUND

A. Civil Service Reform Act

In 1978, Congress passed the Civil Service Reform Act (CSRA), the most comprehensive reform to the system governing the federal work force since the establishment of the Civil Service Commission in 1883.

Among its provisions, CSRA created the Merit Systems Protection Board and the Office of Special Counsel. The MSPB, an independent, three-member board, conducts hearings and appeals involving federal employees. The OSC investigates prohibited personnel practices and other activities prohibited by civil service law. Prohibited personnel practices are defined in statute (5 U.S.C. 2302(b)) and involve a range of personnel actions taken by or against federal employees for prohibited reasons. One of the more significant prohibited personnel practices is taking a personnel action against an employee in reprisal for a disclosure of government wrongdoing or fraud, i.e., "whistleblowing".

Considerable attention was devoted to the fact that CSRA established, for the first time, a statutory protection against reprisals for whistleblowing. The Senate Governmental Affairs Committee's Report on CSRA (S. Rpt. 95–969) contained a specific section on whistleblowers, citing their importance to the government and the Special Counsel's crucial role in protecting them. The Committee Report stated:

> S. 2640 [CSRA] gives the Merit Systems Protection Board and the Special Counsel explicit authority to protect whistleblowers—Federal employees who disclose illegal or improper government activities. Often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss.
>
> Protecting employees who disclose government illegality, waste and corruption is a major step toward a more effective civil service.

The Report continued:

> S. 2640 [CSRA] will establish significant protections for whistleblowers. For the first time, and by statute, the Federal Government is given the mandate—through the Special Counsel of the Merit Systems Protection Board—to protect whistleblowers from improper reprisals.

B. MSPB's Functions

The Board is composed of three members who are appointed by the President with the advice and consent of the Senate for seven year terms and who can be removed from office only for inefficiency, neglect of duty or malfeasance. The Board is based in Washington, D.C. and has 11 regional offices around the country.

The most significant personnel actions are appealable by an affected employee directly to the MSPB, regardless of the agency's basis for taking the personnel action. These are called "adverse actions" and include employee removal, reduction-in-grade, reduction-in-pay, furloughs for 30 days or less and suspensions of more than 14 days. In addition, the MSPB may hear cases involving reduction-in-force decisions and determinations by the Office of Personnel Management (OPM) on disability and other retirement claims. The MSPB also hears cases brought by the OSC.

Employees who are subjected to less significant personnel actions—such as transfers or denials of promotion—may not appeal directly to the Board but may seek assistance from the OSC if these actions are based on prohibited reasons. These prohibited reasons are defined in statute (5 U.S.C. 2302(b)) and include taking reprisal for whistleblowing; taking reprisal for the exercise of appeal rights; engaging in discrimination; engaging in nepotism; willfully obstructing any person's right to compete for employment; taking or failing to take a personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles.

These personnel actions based on prohibited reasons are called "prohibited personnel practices". Employees subjected to adverse actions based on prohibited reason may simultaneously appeal to the MSPB and seek assistance from the OSC.

The MSPB has two levels of appeal of agency personnel actions. The first review is performed at the regional office level by an administrative law judge. If either party to the appeal requests a review of the regional office decision, a second review is conducted by the Board itself.

Employees may further appeal a final Board decision to the United States Court of Appeals for the Federal Circuit. OPM can also appeal if the Director of OPM determines that the Board erred in interpreting a civil service law, rule of regulation affecting personnel management and the Board's decision will have a substantial impact on a civil service law, rule, regulation or policy directive. The OSC has no authority to appeal a Board decision.

The Board's regional offices hear approximately 7,000 cases a year. An exception was in 1983 when the Board's caseload increased dramatically as a result of the strike by, and subsequent firing of, air traffic controllers.

The Board also has the authority and responsibility to conduct studies on the merit system and report to the President and Congress. The Board is also required to report annually on the significant actions of OPM.

C. OSC's Functions

The Special Counsel is an attorney appointed by the President with the advice and consent of the Senate for a five year term. Like the members of the Board, the Special Counsel may be removed from office only for inefficiency, neglect of duty, or malfeasance in office.

The OSC has specific responsibility for investigating prohibited personnel practices. Federal employees or applicants for federal employment who allege they are the victims of a prohibited personnel practice can come to the OSC for assistance. The OSC is required to investigate the employee's claim to the extent necessary to determine whether there are reasonable grounds to believe a prohibited personnel practice has indeed occurred. The OSC can also investigate prohibited personnel practices on its own initiative, without an allegation by an individual federal employee. If the OSC terminates its investigation of an employee's claim, the OSC is required to notify the employee in writing.

The OSC has authority to seek a "stay" from the MSPB of any personnel action taken against the employee, when the OSC determines that there are reasonable grounds to believe that the personnel action is based on a prohibited personnel practice. The OSC can initially seek a stay from a member of the MSPB for 15 days. The OSC has authority to go back to the MSPB and request an additional 30-day stay, and, if necessary, a third stay of indefinite duration.

If the OSC determines corrective action is necessary for an employee who has been adversely affected by a prohibited personnel practice, the OSC may request the MSPB to consider the matter. After hearing the case, the MSPB may order whatever corrective action it considers appropriate. The OSC has no litigating authority and thus cannot appeal a MSPB decision to federal court.

In addition, the OSC can petition the MSPB for disciplinary action against an employee who has committed a prohibited personnel practice. Any employee who is the subject of disciplinary action ordered by the MSPB can appeal that decision to federal court.

The OSC also has authority to investigate alleged Hatch Act or Freedom of Information Act violations, or any other activities prohibited by civil service law, rule or regulation, and can petition the MSPB for disciplinary action necessary to address such violations.

Federal employees or applicants for employment can also come to the OSC in order to make a "disclosure" of information which the employee believes shows "a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." The OSC does not have the power to investigate such allegations of agency proglems but must review them and refer them to the appropriate agency head for investigation. If the Special

Counsel determines that there is a substantial likelihood that the information discloses "a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," the OSC may require an agency report on the disclosure, signed by the agency head, within 60 days.

For other disclosures, which the OSC determines do not have a substantial likelihood of showing a significant problem, the OSC must still refer the disclosure to the agency but can require a less formal report without any set time limit.

The OSC receives approximately 1300 allegations of prohibited personnel practices a year. It also receives about 130 disclosures of government waste, fraud or abuse.

III. NEED FOR REFORM

Unfortunately, as described further in this report, Congress' well-intentioned efforts to protect whistleblowers have thus far had little effect. An October 1984 report by the MSPB illustrated how little impact CSRA has had in protecting whistleblowers.

The 1984 report, entitled "Blowing the Whistle in the Federal Government" (the most recent MSPB report on this subject), compares two surveys conducted by the Board in 1980 and 1983. Each survey was of federal employees and their knowledge of fraud, waste and abuse affecting their agencies and whether they were able to report such activities free from reprisal. The Board chose this topic for a study, it said, because of Congress' particular interest in the whistleblower protections of CSRA.

While the Board found that the percentage of employees who claimed recent knowledge of fraud, waste, and abuse had dropped from 45 percent in 1980 to 25 percent in 1983, it also found that most employees with knowledge of government wrongdoing chose not to report it. In 1980, an overwhelming 70 percent of employees with knowledge of fraud, waste and abuse did not report it. In 1983, it was an almost identical figure of 69 percent. As the Board itself pointed out, these statistics indicated that "no measurable progress has been made in overcoming Federal employee resistance to the idea that they should report instances of fraud, waste and abuse.

Moreover, the percentage of employees who did not report government wrongdoing because of fear of reprisal rose dramatically. In 1980, 20 percent of employees who perceived agency problems did not report them because of fear of reprisal. By 1983, that figure had almost doubled to 37 percent. This astounding increase among federal employees of fear of reprisal was a dramatic indication of how ineffective CSRA has proved to be in this area.

Even a sitting Special Counsel stated publicly that he did not believe the system worked to protect whistleblowers. In a July 17, 1984, Washington Post article, William O'Connor, the Special Counsel from 1982 to 1986, reportedly stated that if he were an attorney advising whistleblowers, "I'd say that unless you're in a position to retire or are independently wealthy, don't do it. Don't put your head up, because it will get blown off."

The Board correctly points out in its 1984 report that statutory protections, alone, cannot guarantee the elimination of reprisal among civil servants. Agency heads and supervisors must foster an environment where employees are encouraged to come forward with suggestions and report problems and are appropriately rewarded, rather than punished, for doing so. However, these statistics do show that Congress' specific statutory efforts to protect whistleblowers thus far have had no observable impact on encouraging federal employees to blow the whistle. Given the central role Congress assigned to the OSC for these functions, as well as the many specific problems with the OSC which are further described below, that office must bear a large part of the responsibility for the failure of the system.

IV. LEGISLATIVE HISTORY

In response to the demonstrated lack of effective protection for whistleblowers, Senators Carl Levin and Charles E. Grassley introduced the "Whistleblower Protection Act" (S. 508) on February 5, 1987. It was similar to a bill introduced by the Senators in the 99th Congress, S. 2014, S. 508 was referred to the Governmental Affairs Committee's Subcommittee on Federal Services, Post Office and Civil Service.

That Subcommittee held two days of hearings on S. 508 on July 20 and 21, 1987 (S. Hrg. 100-422) (hereinafter referred to as Subcommittee hearings). The witness were:

—Honorable Carl Levin, Senator from Michigan
—Honorable Charles E. Grassley, Senator from Iowa
—Mr. Harold Hipple, former Veterans' Administration Hospital Police Officer
—Mr. Joseph D. Whitson, Jr., former employee, U.S. Air Force
—Dr. Mary E. Brothers, former surgeon, Veterans' Administration Hospital
—Mr. Lawrence Timothy Reid, engineer, U.S. Navy
—Dr. Donald R. Soeken, Association of Mental Health Specialties
—Mr. Edward E. Wright, Whistleblower Coalition
—Mr. Thomas Devine, Legal Director, Government Accountability Project
—Mr. Loeb Julie, President, Coalition to Stop Government Waste
—Honorable Mary Wieseman, Special Counsel, Office of Special Counsel
—Mr. Llewellyn M. Fischer, General Counsel, Merit Systems Protection Board.

Senators Levin and Grassley provided testimony on the plight of whistleblowers in the federal government and the need, in their view, for strong reform legislation to improve the protections available to federal employee whistleblowers. Mr. Hipple, Mr. Whitson, Dr. Brothers, and Mr. Reid testified regarding their experiences as whistleblowers in the federal government. All four were critical of the OSC and provided suggestions for improving the role of that office in advising and protecting federal whistleblowers.

Dr. Soeken provided testimony regarding the psychological effects of whistleblowing has on many individuals. He submitted for the record a study written by him and Dr. Karen L. Soeken enti-

tled "A Survey of Whistleblowers: Their Stressors and Coping Strategies." Mr. Wright submitted 11 recommendations developed by the Whistleblower Coalition for improvements to current law to better protect whistleblowers.

Mr. Devine provided detailed examples of problems the Government Accountability Project had identified with the OSC, along with specific suggestions for improvements to current law. Mr. Julie provided testimony on disputes resolution or arbitration as a possible alternative to the current appeals system.

Ms. Wieseman provided testimony regarding improvements at the OSC and examples of OSC vigilance in procuring both corrective and disciplinary actions in whistleblowing cases. Mr. Fischer provided testimony regarding the practical effects of S. 508 on the Board.

Following the Subcommittee hearings, Committee staff held numerous discussions with various representatives of the OSC, the MSPB, the Office of Management and Budget (OMB) and the Department of Justice (herinafter referred to as the Administration) in an effort to address some of their concerns with the bill. A number of changes were made to S. 508 in response to these discussions and to the many suggestions made at the hearings. A Subcommittee substitute, which was a revised version of S. 508, was reported out unanimously by the Subcommittee on May 12, 1988.

S. 508 was considered by the full Committee on May 19, 1988. Senator Levin offered five amendments en bloc which were accepted; most of these were offered in response to Administration concerns. Senator Pryor also offered two technical amendments which were accepted. A quorum being present, the bill was ordered to be favorably reported to the full Senate by voice vote.

Similar legislation (H.R. 25) has been introduced in the House of Representatives by Representatives Patricia Schroeder and Frank Horton. In addition, the House approved whistleblower protection legislation during the 99th Congress (H.R. 4033, House Report 99–859) but it was not acted upon by the Senate before Congress adjourned in 1986.

V. MAJOR ISSUES ADDRESSED BY S. 508

A. OSC's Role and Purpose

1. OSC's responsibility to whistleblowers

There has been dispute over the precise nature of the OSC's role and the extent of its obligations to employees. The OSC's first corrective action case (*Frazier* v. *U.S. Marshals Service* (1 M.S.P.R. 163 (1979) and *Frazier* v. *Merit Systems Protection Board*, 672 F.2d 150 (1982)) was a key case for defining the OSC's responsibilities. The *Frazier* case argued that the Special Counsel should be a "public defender" for federal employees, the Board determined that the OSC's role was not that of an employee's advocate but more of "a prosecutor charged with vindicating the Act's goal of achieving a fair, efficient, and lawfully conducted Civil Service." *Frazier* v. *M.S.P.B.*, 672 F.2d at 162.

Former Special Counsel O'Connor strongly agreed with the OSC-as-prosecutor analogy. Mr. O'Connor stressed that his job was to

protect the merit system rather than the interests of individual employees. He likened his responsibilities as Special Counsel to that of a criminal prosecutor who has no direct obligation to the victims of crime, but who helps them indirectly by punishing criminals and thereby maintaining compliance with the law. Mr. O'Connor emphasized the OSC's authority to seek disciplinary actions for employees who commit prohibited personnel practices, rather than corrective action for the victims of those practices.

During hearings held in the House of Representatives Civil Service Subcommittee in May and June, 1985, Mr. O'Connor stated:

> Now, it is not surprising to me that the witnesses whose testimony I have read have indicated some bias in many cases. After all, these witnesses are observers, not clients, of the Office of Special Counsel. I stress "not clients of the Office of Special Counsel."
>
> The Office of Special Counsel has only one client; it is the enforcement of the merit systems and the laws that carry it into effect.

The Committee believes this emphasis on protecting the "system" is flawed because it sends a message that the interests of the individual participants in that system are not the OSC's priority. The Committee believes that while it is important to discipline those in the civil service who violate merit system principles, it is essential that employees who are victimized by such violations also receive the OSC's attention and assistance. Assuring employees that the OSC's priority is to protect them from reprisal rather than punishing someone else is an essential step in encouraging employees to blow the whistle.

The OSC's approach to whistleblower cases prior to 1986 was further flawed by a policy of pursuing only absolutely "winnable" cases. The General Accounting Office (GAO) reported in a 1985 report on the OSC that the Special Counsel would only accept cases in which there was an 75–80% chance of winning.[1] The OSC's fiscal year 1985 annual report went a step further and noted that the Office would not file complaints "unless there is virtual certainty that the evidence provides sufficient facts to ensure success . . ." Such statements sent employees the intimidating message that the OSC would only consider their cases if they were near-perfect and if success were virtually certain. This message was particularly discouraging for the many employees for whom the OSC was the only avenue of relief. It is important that the OSC be willing to pursue cases where there is a reasonable likelihood that a prohibited personnel practice has occurred and not just those that are deemed absolutely winnable. It is the Committee's understanding that this is consistent with the OSC's current standard for deciding to litigate a case; that is, the OSC's current criterion for formal litigation of a case is that there must be at least a reasonable likelihood of success in prevailing on the merits of the case.

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[1] "Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection", GAO/GGD–85–53, May 10, 1985.

The OSC's role was discussed in the 1985 GAO report, which had been requested by then Chairman of the Senate Governmental Affairs Committee, Senator William V. Roth, Jr., and the Chairwoman of the House Subcommittee on Civil Service, Representative Patricia Schroeder. The report discussed the Special Counsel's view of his job and the impact this view has had on employees seeking the OSC's assistance. That report stated:

> Few of the [whistleblower] complainants will ever receive the relief they seek through the Office of Special Counsel, particularly as the Special Counsel does not emphasize the pursuit of corrective action on behalf of aggrieved whistleblowers. During the two years prior to August 1984, the Special Counsel obtained redress for a total of but three whistleblowers—redress in the form of canceled transfers.

At the same time, the GAO found in a sampling of 76 cases closed by the OSC that none had been closed by the OSC without reasonable grounds to do so and that those cases had been investigated until at least one defect in prosecutive merit had been found. The GAO report discussed possible alternatives to the viewpoint that the OSC was a public prosecutor pursuing only cases with no legal defects, stating:

> Current law does not impose an "ombudsman" responsibility on OSC. OSC's investigation and analysis of cases brought to it are not oriented toward determining whether the cases have merit from any other perspective than legal prosecutability. As soon as a legal defect in a case is clearly demonstrated, OSC closes its investigation. An ombudsman given responsibility for investigating these same complaints might well have pursued some of them further, looking for opportunities to conciliate or to address other standards of "merit" and "justice" than prosecutorial ones.

The current Special Counsel, The Honorable Mary Wieseman, has stated she does not see a contradiction between protecting the merit system and protecting the employees who comprise that system. At the Subcommittee hearings, Ms. Wieseman said: "There is no conflict at all that I can see between protecting Federal employees from prohibited personnel practices—which is the highest priority—and protecting the merit system."

The Committee agrees that the protection of whistleblowers is consistent with the protection of the merit system. To avoid future disputes about where the Special Counsel's obligations lie, S. 508 states clearly and definitively that Congress intends the OSC's purpose to be the protection of employees, particularly whistleblowers. Specifically, the bill provides in section 2:

—that the primary purpose of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

—that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel and not contrary to such interests; and

—that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish these goals, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

The Committee expects the OSC to assume more of an ombudsman role and to vigorously protect employees who seek the OSC's help. The OSC should not limit its activities to only those cases which are deemed absolutely winnable, but to those cases where there is a reasonable likelihood a prohibited personnel practice has occurred. This does not mean the OSC should not continue its practice of seeking settlements with agencies prior to initiating action before the Board where it is appropriate to do so. However, the OSC should, to the extent practicable, include the affected employee in the OSC's discussions with the agency.

OMB has informed the Committee that it opposes the clarified purpose for the OSC because of OMB's concern that the language may create a binding attorney-client relationship between the OSC and complainants. While S. 508 is not intended to establish such an attorney-client relationship between the OSC and complainants, several provisions in the bill would create specific protections for complainants similar to those in an attorney-client relationship. Two of the more significant ones are the prohibition on OSC intervention against employees during their appeals before the MSPB and the limitation on the kind of information the OSC can disclose about employees who have sought the OSC's assistance.

2. PROHIBITION ON OSC INTERVENTION

The provision which would limit the OSC's right to intervene in cases without employees' consent is intended to provide employees with assurance that if they come to the OSC for assistance and provide the OSC with information but the OSC declines to pursue their case, the OSC will not use such information against those employees by intervening in appeals they may bring before the MSPB. While the Committee is not aware of specific instances where the OSC has inappropriately intervened in employee appeals, this provision would provide a guarantee to employees who have sought the OSC's help that the OSC will not later act against them. This prohibition would apply only to corrective action cases. The OSC would retain the right under S. 508 to intervene in disciplinary action cases where an employee is charged with committing a prohibited personnel practice, since seeking disciplinary action for such practices is the particular responsibility of the OSC.

S. 508 would retain the OSC's current authority to file *amicus curiae* briefs in either corrective or disciplinary action cases. While the OSC should not be permitted to intervene against employees, it is appropriate for the OSC to be able to comment on a case and file an amicus brief, particularly if some important aspect of civil service law is in dispute.

3. LIMITATION ON OSC DISCLOSURES

The case of Elaine Mittleman illustrates the need for another provision in S. 508 which would limit the kind of information the

OSC can release about complainants. Ms. Mittleman appealed to the OSC in December 1980, alleging reprisal for allegations she had made regarding the Chrysler Loan Guarantee Board within the Department of Treasury. In November 1981, the OSC closed its investigation of Ms. Mittleman's case, concluding there was insufficient evidence of any prohibited personnel practice.

Ms. Mittleman sought other federal employment unsuccessfully. In July 1983, she obtained documents from the Office of Personnel Management (OPM) on an OPM investigation conducted earlier that year on Ms. Mittleman's loyalty and fitness for government employment. Among the witnesses contacted by OPM was an OSC investigator whose contacts with Ms. Mittleman had been limited solely to telephone conversations. According to the OPM documents, the OSC investigator's comments included references to "Mittleman's totally abrasive behavior." In every conversation with Ms. Mittleman, the OSC investigator stated "her behavior was erratic and abrasive."

The OSC document concluded with "Source notes that he has no other independent knowledge of subject but, based on his conversations with subject and review of reports, he would not hire the subject to work in any sensitive position in the United States Government."

Ms. Mittleman not only did not receive any assistance from OSC on her complaint of reprisal, she was actually hurt by her contacting the OSC because of the OSC investigator's negative comments to OPM. In this particular instance, the OSC was required to respond to OPM because OPM regulations require that federal employees respond to OPM requests for information concerning other federal employees.

Other employees have made similar complaints that the OSC provides inappropriate information to agencies, to the detriment of those employees relying on the OSC for help. S. 508 would avoid any future problems of this kind by prohibiting the OSC from responding to any inquiry or providing information concerning any person seeking corrective action from the OSC, except in accordance with the Privacy Act or as required by other federal law. S. 508 would specifically prohibit the OSC from responding to personnel inquiries such as OPM background checks on employees who have sought the OSC's help.

B. Legal Issues

Whistleblower reprisal cases are among the most complex of those considered by the Board and the courts. If a whistleblower has had a personnel action taken against him/her, it can be very difficult to discern whether the action was taken because of legitimate management reasons or because of prohibited retaliatory reasons.

1. PRIMA FACIE CASE

The Board laid out the necessary elements for proving a case of reprisal in the *Frazier* case. The Board established a four-part test for making a *prima facie* case of reprisal. The Special Counsel or the employee (if the personnel action is an adverse action and thus

permits the employee to file directly with the MSPB) must prove by a preponderance of evidence that:

(1) A protected disclosure was made;

(2) The accused official had actual or constructive knowledge of the disclosure;

(3) There was some adverse action taken against the employee, and that action could, under the circumstances, have been retaliation; and

(4) There was a genuine nexus, or casual connection, between the protected activity and the agency's action against the employee.

a. Protected disclosures

The statute (at section 2302(b)(8) of title 5, United States Code) defines "protected disclosure" as:

> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health . . .

According to the statute, the employee must only have a reasonable belief that his/her disclosure is true in order for a disclosure to qualify as protected; the actual veracity of any disclosure, in theory, does not affect whether a disclosure is protected. In addition, for those disclosures under section 2302(b)(8)(A) which are not required to be kept confidential, the statute does not specify to whom disclosures must be made to qualify as protected.

Despite the clear language of the statute, the interpretation of what is a "protected disclosure" has varied among the OSC, the MSPB and the courts. The GAO's 1985 report reviewed a sample of 76 cases where reprisal for whistleblowing had been alleged and which the OSC had closed. Among the reasons for closing cases were those where the OSC determined that the complainant's disclosure was not protected. GAO stated: "If an employee voices internal criticism of agency practices or individual misconduct, without a revelation to responsible agency officials or to an independent entity such as the inspector general, the Congress, or the media, OSC often questions whether there was protected whistle-

blowing notwithstanding the circumstance that internal dissidence can expose an employee to reprisal as well as outside disclosure."

In *Fiorello* v. *Department of Justice* (795 F. 2d 1544, 1550 Fed. Cir. 1986) an employee's disclosures were not considered protected because the employee's "primary motivation" was not for the public good, but rather for the personal motives of the employee. The court reached this conclusion despite the lack of any indication in CSRA that an employee's motives are supposed to be considered in determining whether a disclosure is protected.

The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase "a disclosure" to "any disclosure" in the statutory definition. This is simply to stress that *any* disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential).

S. 508 would also change the definition of protected disclosures from "mismanagement" to "gross mismanagement". While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies provided under S. 508 that could be used by employees who have made disclosures of trivial matters. CSRA specifically established a de minimus standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved "a gross waste of funds." Under S. 508, the Committee establishes a similar de minimus standard for disclosures of mismanagement by protecting them only if they involve "gross mismanagement."

b. Nexus between a protected disclosure and a personnel action.

Proving a causal connection between protected conduct and an agency's personnel action is difficult because direct evidence of retaliation is rare; supervisors do not usually write down or tell other employees of their intent to take prohibited reprisal against an employee. Thus, one of the hardest hurdles a whistleblower or the OSC must overcome in making a *prima facie* case of reprisal is to show the requisite nexus between the whistleblowing and the personnel action. GAO noted in its 1985 report that two-thirds of the cases closed by the OSC were closed in anticipation that the agency could argue persuasively that there was no causal connection between the complaint's whistleblowing and a personnel action.

It appears, under a recent court decision, that for an employee to prove a "nexus", the employee must show that the motive for the agency's action was "predominantly retaliation" (*Warren* v. *Dept. of Army,* 804 F.2d 654 (Fed. Cir. 1986)). Earlier cases had required the employee to prove that retaliation was a "significant" factor in the agency's actions (e.g., *Frazier*). S. 508 would establish in law a reasonable standard for proving the nexus by requiring proof only that retaliation was "a factor" in a personnel action, rather than a "significant" or a "predominant" factor. An employee would have

to prove this by a "preponderance of the evidence" which is the same standard as under current law.

In addition, under S. 508, one of the ways an employee or the Special Counsel would be able to establish a nexus would be by showing that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action. The Board already has the authority to consider the taking of a personnel action within a relatively short time after a disclosure is made as an indication of reprisal. The Committee intends for the Board to use this reasonable time standard liberally because most reprisal cases are necessarily built on such circumstantial, rather than direct, evidence.

For example, the Committee believes that an action taken within the same performance evaluation period would normally be considered within a "reasonable time." In some cases, even a longer period of time may be considered reasonable. For example, there may be cases where a disclosure is of such significance, or an employee is subject to such disparate treatment, that a longer period of time may be appropriate. The Committee has decided not to state a specific period of time, nor is this provision intended to give the Board the authority to define a specific time period for all cases, because such decisions should be made on a case by case basis.

This provision in S. 508 described above only describes one of the ways in which nexus may be shown. The Committee does not intend for this to be the exclusive way a nexus may be shown. For example, in appropriate cases, demonstrating constructive knowledge, rather than actual knowledge, on the part of the agency official may be adequate for showing a nexus.

2. AGENCY'S DEFENSE

Under current law, if an employee succeeds in proving a "nexus" and thus making a *prima facie* case of reprisal, the agency has an opportunity to show, as an affirmative defense, that it would have taken the personnel action even if the employee had not engaged in protected conduct. This affirmative defense was developed by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle* (429 U.S. 274 (1977)) and has been applied by the Board and the courts to reprisal cases where there has been shown to be both legitimate reasons for the personnel action and prohibited retaliatory reasons. The agency must prove its affirmative defense by a preponderance of the evidence.

The Committee finds that in practice, the *Mt. Healthy* test has allowed an agency to search an employee's work record for conduct that can be cited as the reason for taking an adverse action. It has proved to be difficult for employees to refute the agency's contention that it would have taken the personnel action anyway.

In a number of instances, the OSC had not pursued a case because it anticipates that the agency will raise the *Mt. Healthy* argument. The OSC's statement in its October 23, 1987, letter to Mr. Frank Bucci, terminating its investigation of Mr. Bucci's allega-

tions of reprisal, is representative of the OSC's rationale in these cases. The OSC stated:

> Arguably, there was some evidence that your reassignment to Philadelphia was the product of reprisal. Nevertheless, in a proceeding before the Board, such evidence would be overcome by the probability that your supervisor in Philadelphia . . . would have removed you for excessive absence, even if you had engaged in protected conduct in Boston. *Mt. Healthy City Bd. of Educ.* v. *Doyle.*

S. 508 would modify the *Mt. Healthy* test only for whistleblower reprisal cases and not for cases involving other kinds of prohibited personnel practices. Once the employee has made a *prima facie* case of reprisal by showing that the whistleblowing was a factor in the personnel action, the agency would be required to show by "clear and convincing evidence" that the whistleblowing was not a "material factor" in the personnel action. "Clear and convincing evidence" is a lesser standard than the criminal standard of "beyond a reasonable doubt" but a higher standard than "preponderance of the evidence" which is the current standard for employee cases of this type. Ms. Wieseman testified at the 1987 Subcommittee hearings that raising the current standard to "clear and convincing" evidence would assist OSC efforts in at least some cases. Under this modified *Mt. Healthy* test, if whistleblowing was a material factor in the personnel action, the agency would lose its defense.

The Administration objects to modifying the *Mt. Healthy* test because of its concern that such a change might result in employees who claim to be whistleblowers being inappropriately immunized from legitimate agency personnel actions.

The Committee does not intend that employees who are poor performers escape sanction by manufacturing a claim of whistleblowing; at the same time, whistleblowers must not be discouraged by agencies being able to use any possible flaw in an employee's work record as an excuse for retaliation. The change in S. 508 to the *Mt. Healthy* test would constitute an effective change to current law which should allow bona fide whistleblowers to prevail, while allowing agencies to appropriately sanction employees where whistleblowing was not a material factor in the personnel action.

3. DEFINITION OF PROHIBITED PERSONNEL PRACTICES

Two recent disciplinary action cases, *Starrett* v. *Special Counsel* (792 F.2d 1246 (4th Cir. 1986)) and *Harvey* v. *M.S.P.B.* (802 F.2d 537 (D.C. Cir., 1986)), raise a troubling potential difficulty for employees by possibly requiring proof of the acting official's state of mind. These cases indicate that if an agency's actions against an employee were based on concerns or factors arising from protected whistleblowing activities, *but* the agency officials were motivated by valid management reasons and not by any intent to "punish" the employee, the courts will not find reprisal. In effect, this could require employees in corrective action cases to show not just that an action against them was based on a protected disclosure, but also that the official's motives in taking the retaliatory action were inappropriate.

Ms. Wieseman commented on the possible ramifications of the *Harvey* case in follow-up questions after the Subcommittee hearings:

> The Court of Appeals' narrow definition of retaliation or reprisal and the court's application of that standard to the facts of the *Harvey* case, portend difficulties in other reprisal cases—particularly where the facts are not as strong as they were in *Harvey* . . . There are several different ways in which the effect of that decision could be ameliorated. One way to do so would be to amend the language of 5 U.S.C. 2302(b)(8) to delete the word "reprisal" and prohibit instead the taking or failing to take (or threatening to take or not to take) a personnel action with respect to employees or applicants for employment "based on" or "because of" the conduct described therein. With or without a change in the statutory language, a legislative history rejecting a narrow application of the *Harvey* language and making it clear that reprisal or retaliation is to be broadly construed to achieve the ends of the statute (i.e., to promote whistleblowing and to deter those who would retaliate against employees who engage in that conduct) would significantly aid our future efforts.

S. 508 would address this problem by amending the definition of prohibited reprisal against whistleblowers to prohibit the taking of personnel actions "based on" protected conduct, rather than current law which prohibits taking personnel actions "as a reprisal for" protected conduct. This change is made because, as described above, the phrase "reprisal" has been interpreted to require a showing of an improper, retaliatory motive on the part of the acting official. The Committee does not intend for such a showing of the official's state of mind to be required. Regardless of the official's motives, personnel actions against employees should quite simpy not be based on protected activities such as whistleblowing.

For purposes of consistency, S. 508 similarly would amend 5 U.S.C. 2302(b)(9). This provision is amended to prohibit the taking of a personnel action "because of" an employee's exercise of an appeal right, rather than "as a reprisal for" the exercise of an appeal right.

In addition, S. 508 would expand the definition of prohibited reprisal against whistleblowers to include "threats to take or fail to take" a personnel action against a whistleblower. At the Subcommittee hearings, Ms. Wieseman's testimony suggested this language as a way of assisting the OSC in providing additional or expedited assistance to whistleblowers. (Senate Hrg. 100-422, p. 424.)

S. 508 would also expand the definition of prohibited personnel practices by prohibiting employers from taking action against employees who cooperate with the OSC or with an Inspector General.

C. Corrective Action

In part because of the limited role assumed by past Special Counsels and in part because of the standard of proof required to win a

reprisal case, very few employees have benefitted from the OSC's authority to seek corrective action.

GAO noted in its 1985 report that most complaints to the OSC were closed during an initial screening. In examining the 1,383 complaints received by the OSC during fiscal year 1984, GAO found "about 8 percent of incoming allegations survive a centralized screening process and are given an in-depth investigation." GAO continued, "because whistleblower reprisal cases are more complicated than other cases, they are more likely to receive a thorough investigation. Even so, 99 percent of these cases are closed by the office without initiating disciplinary or corrective action."

For many whistleblowers, namely those who are the alleged victims of a reprisal not involving an adverse action, the OSC is the only avenue of appeal. The OSC's track record through 1985 of helping only 1% of whistleblowers obviously left a great many employees dissatisfied.

The OSC appears to now be placing more emphasis on corrective actions, with the result that OSC now seeks action in about 5% of whistleblower cases.[2] While this five-fold increase in activity is welcome, it still leaves many employees frustrated with the lack of OSC action and the absence in many cases of other possible relief.

S. 507 would remove the monopoly the OSC has over many cases involving employees alleging reprisal for whistleblowing. The bill would provide that whistleblowers who are presently confined to using the OSC can individually petition the MSPB if the OSC terminates its investigation of the employee's case or if the OSC fails to commit to pursuing the case within 90 days of receiving the complaint.

Whistleblowers filing with the Board through this individual right of action may also request the Board for a stay of the pending personnel action. It is expected the Board will be fairly liberal in granting these stays, since they would be only temporary and would not significantly affect the agency's functioning.

If the 90 days has been exhausted and a whistleblower chooses to pursue his/her case before the Board, the OSC may continue its investigation of the employees's case only with the employee's consent. The OSC, however, is not bound to continue investigating a case that a whistleblower decides to pursue on his/her own.

GAO's 1985 report noted that "the fact that some personnel actions, including transfer, reassignment, and a change in duties without a reduction in grade, can be reviewed by the MSPB only if brought by the Special Counsel, is a particular source of frustration" for many employees. The Committee believes this individual right of action is important to assure whistleblowers, at the very least, of having an opportunity to argue their case in a hearing—with or without the OCS's involvement. At the same time, it is hoped that the OSC will demonstrate an increased commitment to whistleblowers so that few employees will feel it necessary to pursue their cases independently.

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[2] According to the OSC's figures provided for the Subcommittee hearings, the OSC received 176 complaints of reprisal for whistleblowing during the first ten months of Ms. Wieseman's tenure; OSC sought action in nine of those cases.

The Committee expects the Board to apply the same procedures for whistleblowers appealing to the Board through this individual right of action as are currently applied to other employees appealing directly to the Board in "adverse action" cases under 5 U.S.C. 7701, i.e., whistleblowers appealing through the individual right of action have the right to be represented by an attorney or other representative and to a transcribed hearing record. The Board, as in other employee appeals, may hear a whistleblower's appeal or it may refer the case to an administrative law judge or other employee designated by the Board to hear such cases.

The Board currently requires that employees subject to personnel actions that are appealable to the Board must file an appeal within 20 days after the effective date of the personnel action. The Board may apply the same 20-day limit to complainants rejected by the OSC who receive an OSC letter terminating its investigation of the complainant's case. However, the Committee does not intend that any time limit be applied to appeals by whistleblowers whose cases have not been formally closed by the OSC, regardless of whether the OSC has committed to pursuing the case within 90 days of the whistleblower's filing with the OSC.

It is important that whistleblowers who seek the OSC's help not be penalized by any OSC decision not to pursue their cases. Toward this end, S. 508 would prohibit a decision by the OSC to terminate its investigation of an employee's case from being considered in any other legal or administrative proceeding.

D. OSC Independence

When the MSPB and OSC were first established under CSRA, the OSC was a part of the MSPB. In a 1980 report detailing the administrative problems OSC had during its first few years, GAO noted that the Board's and OSC's effectiveness were somewhat diluted because of the confusion over each entity's responsibility and authority.[3] GAO stated "although both [the Board and the OSC] were given separate authorities and functions, there is uncertainty concerning their authority with respect to one another . . . Because of this uncertainty, the Board has submitted proposed legislation that would separate the Office of the Special Counsel from the Board and establish it as a totally independent agency."

The Board and the OSC separated themselves administratively in 1984. S. 508 completes this process by establishing the OSC as an independent agency.

In addition, S. 508 would grant the OSC Litigating authority so that it can appeal decisions of the Board to federal court. The OSC requested litigating authority in several of its earlier annual reports. During the 98th Congress, Senator Grassley and Senator Ted Stevens both introduced bills which would have granted the OSC authority to appear as counsel on behalf of any party in any civil action brought in connection with the OSC's function. Senator Grassley successfully offered his measure as an amendment to H.R.

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[3] "First Year Activities of the Merit Systems Protection Board and the Office of the Special Counsel," GAO/FPCD-80-46, June 9, 1980.

5646 on October 11, 1984. The House, However, did not accept the amendment.

E. OSC Procedures

At the Subcommittee hearings, Joseph Whitson testified about his frustrating efforts to work with the OSC on his case alleging reprisal for his disclosures of problems within the government laboratory where he worked.

Mr. Whitson testified that he first contacted the OSC on August 17, 1984. He received an acknowledgement form the OSC on August 27, 1984. In October 1984, Mr. Whitson contacted the OSC and was informed that an investigator was assigned to his case. Mr. Whitson said that several calls to that investigator were not returned.

In January 1985, Mr. Whitson contacted the OSC again and was informed that his case had been referred to the OSC's Dallas office and that a second OSC investigator had responsibility for the case. Mr. Whitson says he set up several meetings between the second investigator and relevant witnesses. According to Mr. Whitson, that investigator, without any advance notice, did not show up for those meetings.

In February 1985, Mr. Whitson was informed that his case had been referred back to Washington, D.C. He called Washington in February 1985 and was told that a third OSC investigator had been assigned to the case. In March 1985, Whitson was informed his case had been assigned to yet another investigator. According to Mr. Whitson, he set up several meetings with that fourth investigator but she did not show up.

Eventually, in August 1985, Mr. Whitson came to Washington, D.C. to try and meet with the fourth OSC investigator. Upon obtaining a meeting with her, he said she appeared unfamiliar with his case. The OSC closed Mr. Whitson's case on September 12, 1985.

In response to Mr. Whitson's testimony, the OSC testified that it is not unusual for some cases, particularly complex ones, to involve several different OSC investigators. The OSC also says it is not their policy or practice to cancel meetings without notice. At the same time, the relevant OSC investigators recall that some meetings with Mr. Whitson were cancelled; they do not recollect that any of those meetings were cancelled without notice. The OSC concedes that no one actually met with Mr. Whitson until he came to Washington.

Mr. Whitson's experience is not unique. Other employees have made similar complaints about the infrequency of the OSC's contact with complainants and the confusion with which investigators handle some cases. In order to keep employees aware of the status of their cases and to promote confidence in the process, S. 508 requires the OSC to regularly inform complainants about developments with their cases. Under S. 508, the OSC would be required to inform complainants within 15 days that their allegations had been received and to provide a contact person for the complainant. At least every 60 days after that, the OSC would be required to provide notice to the complainant of OSC action taken since the previous notice.

The Committee believes not only that the regularity of the notice is important but also that each 60-day notice provides enough information about case developments so that it is useful to the recipient. At the same time, the OSC is not expected to provide notices of such length or comprehensiveness that they require an inordinate amount of staff time. A modified form letter may be used, as long as it provides enough specific information about the particular case being investigated so that complainants are kept reasonably informed about the progress of their cases.

In addition, under current law, when the OSC closes out a case, it is required to provide the complainant with a written notice of the termination of the case and the reasons therefor. A number of employees have complained that these closeout letters are too brief and do not provide enough information to allow the employee to fully understand the reasons why the case was not pursued. GAO's 1985 report found that two-thirds of the OSC's closeout letters provided a straightforward and informative—though succinct—explanation of the reasons the case had been closed. This figure presumably leaves one-third of the complainants with closeout letters that are not straightforward and informative.

S. 508 would improve the utility of these closeout letters to complainants by requiring that they include "a summary of relevant facts ascertained by the Special Counsel, including those that support and those that do not support the complainant's allegations." The provision of such information describing briefly the strong points and the weak points of an employee's case should prove particularly helpful to those employees who intend to appeal on their own to the MSPB.

F. Stays

Current law permits the OSC to seek an initial 15-day stay from the Board on behalf of an employee, with authority to seek a second 30-day stay if necessary, and then a subsequent third stay of indefinite duration. The Committee is concerned that the OSC has exercised its authority to request the Board to issue stays of personnel actions far too sparingly. In the ten months prior to the OSC's testimony at the Subcommittee hearings, the OSC sought only five stays, four or which were worked out informally with the relevant agencies and one of which was sought through the Board. The OSC has characterized stays as "an extraordinary remedy" which the OSC can seek only under very limited circumstances.[4]

The Committee intends for the OSC to use its authority to request stays more routinely. A temporary halt to an agency's personnel action can be extremely important for an employee, while usually imposing minor inconvenience on the agency. To make stays somewhat easier to obtain, S. 508 would permit the OSC to seek initially a single 45-day stay from the Board, with authority to seek a subsequent stay of indefinite duration if necessary.

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[4] May 24, 1985 OSC letter to Mr. Eduardo Delgado.

G. Court Venue

Under current law, employee appeals of decisions by the MSPB go to the United States Court of Appeals for the Federal Circuit. The Federal Circuit Court was established in 1982 by the Federal Courts Improvement Act; prior to this Act, appeals of MSPB decisions went to the federal courts of appeal for the various circuits.

S. 508 would eliminate the Federal Circuit Court's monopoly of federal employee whistleblower cases by allowing these cases to be appealed to either the Federal Circuit Court or to the court of appeals in the circuit where the petitioner resides. This change would allow for a wider variety of decisions on the important issue of whistleblowers' rights. It also would increase the likelihood of Supreme Court review of these issues in the event of a split in the circuits on interpreting the whisteblower laws.

S. 508, as originally introduced, would have allowed all federal employee appeals to go to either the Federal Circuit Court or to the court of appeals in the circuit where the petitioner resides. Because of the Administration's strong objections to this provision and in an effort to permit a choice of venue on a test case basis, S. 508 was modified so that only federal employees alleging reprisal for whistleblowing would have a choice of venue. The Administration remains opposed to even this modified provision, arguing that the uniformity of decisions that the Federal Curcuit Court currently provides is essential.

H. OSC Referrals of Information

Many of the disclosures of government waste and fraud which the OSC receives have proved to be valid and useful. In 1986 the Special Counsel reported in a letter to Senator Levin that over half of the employee allegations referred to agencies were substantiated in whole or in part by the required agency reports. However, it is questionable whether these validated disclosures receive appropriate follow-up attention.

These agency reports on employee disclosures currently are provided to the President, the Congress and the employee making the disclosure. To ensure that these reports are accurate, S. 508 would require that the OSC provide the employee making the disclosure with an opportunity to comment on the agency's report. S. 508 would also provide the OSC with an opportunity to comment on the agency's report; the OSC, with its investigative experience, might have helpful comments on the manner in which the agency reviewed and investigated the disclosure. To ensure that these disclosures are reviewed by appropriate offices which can best take advantage of the information, S. 508 would require that the agency reports and the employee's comments be forwarded to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.

I. MSPB Litigating Authority

Until January 1987, the Board had the authority to defend some of its decisions in court. Up until that time, the Federal Circuit Court had issued a series of decisions holding that the Board was

the appropriate statutory respondent in cases involving jurisdictional and procedural issues where the merits of the underlying personnel action was not at issue (e.g., *Hopkins* v. *MSPB* (725 F.2d 287 (Fed. Cir. 1984)). However, in *Hagmeyer* v. *Department of Treasury* (809 F.2d 1581 (Fed. Cir. 1987)), the Court of Appeals for the Federal Circuit reversed its own precedent and held that the employing agency should be the respondent in all employee appeals to that Court.

S. 508 would reverse the *Hagmeyer* decision and provide the Board with the litigating authority established under *Hopkins* and similar decisions. The bill would provide that the Board be the respondent in appeals involving jurisdictional and procedural matters, which are matters purely within the Board's jurisdiction, which the employing agency would be the respondent in cases involving the underlying personnel action or attorney's fees.

J. Other Provisions

Even if an aggrieved whistleblower is able to prevail in an appeal before the Board or in court, returning to the former workplace can be traumatic since there may be significant hostility on the part of coworkers and supervisors. To provide realistic relief for whistleblowers, S. 508 would allow whistleblowers who succeed in an appeal before the Board to receive a preference in seeking a transfer to other federal employment. It is hoped that this transfer preference will allow bona fide whistleblowers to effectively avoid any possible additional acts of reprisal.

Current law allows the awarding of attorney's fees only if it is warranted "in the interest of justice". Because this standard makes such awards infrequent, employees who succeed in proving they were subject to a prohibited personnel practice can still end up adversely affected because of the financial burden of attorney's fees. S. 508 would require that the relevant agency be liable for attorney's fees if the employee is the prevailing party and the decision is based on a finding of a prohibited personnel practice.

Under current law, employees who prevail at the original level of the MSPB are not granted relief until any appeal to the full Board has been heard. While the MSPB currently handles its cases fairly promptly, a few weeks or months between a regional decision and a full Board decision may still be too long for an employee denied his/her job or performing unwanted duties. S. 508 would allow employees who prevail at the MSPB's regional level to be granted the relief due them pending review by the full Board.

VI. SECTION-BY-SECTION ANALYSIS

Section 1 of this Act states that the title of the bill is the "Whistleblower Protection Act of 1988."

Section 2 states the findings and purposes of the bill. Subsection (a) states that Congress finds that: whistleblowers (federal employees who disclose waste, fraud, and abuse) serve the public interest, that protecting such whistleblowers is a major step toward a more effective civil service, and that the Civil Service Reform Act of 1978 was intended to provide whistleblowers protection from reprisal.

Subsection (b) states that the purposes of this Act are: to improve the protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing in the government by mandating that employees should not suffer from prohibited personnel practices, and by establishing that the primary purpose of the Office of Special Counsel (OSC) is to protect federal employees, especially whistleblowers, from prohibited personnel practices. It is also established that the OSC shall act in the interests of employees who seek asssistance from the OSC, and not contrary to those interests, and that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish these goals, protection of individuals who are the subject of prohibited personnel practices is the paramount consideration.

Section 3 of this Act makes a number of changes to Chapter 12 of title 5, United States Code. This section covers the Merit Systems Protection Board (Subchapter I), the Special Counsel (Subchapter II), and the individual right of action (Subchapter III).

SUBCHAPTER I: THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

Sections 1201 through 1203 are unchanged from current law. These sections cover the appointment of members of the MSPB (or "Board"), their terms of office, removal, filling vacancies, and the appointment process for the Chairman and Vice Chairman.

Section 1204 covers the powers and functions of the MSPB. Except for the changes as noted, this section is the same as current law.

Subsection (a) gives the MSPB the authority to conduct hearings, to order any federal agency or employee to comply with MSPB orders or decisions, to conduct special studies on the civil service and on other merit systems in the executive branch, and to review rules and regulations of the Office of Personnel Management (OPM).

Subsection (b)(1) gives any member of the MSPB, any administrative law judge appointed by the MSPB, and any employee of the MSPB designated by the MSPB the authority to administer oaths, examine witnesses, take depositions and receive evidence.

Subsection (b)(2) gives any member of the MSPB, any administrative law judge appointed by the MSPB, and any employee designated by the MSPB the authority to issue subpoenas requiring the attendance and testimony of witnesses. This is different from current law, which states that only members of the MSPB and administrative law judges appointed by the MSPB (and not other designated employees) may issue subpoenas. Subsection (b)(3) is the same as current law and simply provides that witnesses shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in U.S. courts.

Subsection (c) states that federal district court shall enforce MSPB subpoenas. Subsection (d) describes how subpoenas outside the territorial jurisdiction of the United States may be served. This is different from current law in that current law does not provide for MSPB subpoenas outside of the United States and its territories.

Subsection (e)(1) is the same as current law and grants members of the MSPB authority to request advisory opinions from OPM on OPM rules and regulations.

Subsection (e)(2)(A) is the same as curent law, and allows the MSPB to stop wage payments to any employee not complying with an MSPB order during the period of noncompliance.

Subsection (e)(2)(B) is a new provision which requires the MSPB to prescribe regulations to allow any employee who is aggrieved by the failure of another employee to comply with a MSPB order to petition the MSPB to exercise its authority under subsection (d)(2)(A).

Subsection (e)(3) is the same as current law and gives the MSPB access to OPM personnel records or other information, unless otherwise prohibited by law, when carrying out its special studies on the civil service. The MSPB may require additional reports from other agencies as needed.

Subsection (f) is similar to current law. It gives the MSPB the authority to review and declare any OPM rule or regulation invalid on its face or invalidly implemented if that rule or regulation requires an employee to undertake a prohibited personnel practice. The MSPB must require any agency to cease compliance with an invalid rule or regulation and to correct any invalidly implemented rule or regulation. OPM and other relevant agencies have the right to participate in any MSPB review. The bill removes the restriction from current law whch requires that any MSPB review be limited to determining whether a rule or regulation is invalid on its face and whether it has been invalidly implemented.

Subsections (g) through (l) are the same as current law.

Subsection (g) allows the MSPB to delegate its administrative functions to any of its employees.

Subsection (h) grants the MSPB authority to prescribe regulations for the performance of its functions.

Subsection (i) allows attorneys designated by the Chairman of the Board to represent the Board in any civil action brought in connection with the Board's functions.

Subsection (j) grants the Chairman of the MSPB authority to appoint necessary personnel without approval or supervision by OPM or the Executive Office of the President.

Subsection (k) requires the MSPB to prepare and submit an annual budget to the President and Congress.

Subsection (l) requires the MSPB to submit legislative recommendations to the President and Congress.

Section 1205 is the same as current law. It allows any member or employee of the MSPB to transmit information to Congress upon request without prior review or clearance by any other administrative authority.

Section 1206 is the same as current law and requires the MSPB to issue an annual report.

Subchapter II—Office of Special Counsel

Section 1211 is a new section establishing the OSC as a Federal agency, separate from the MSPB. As under current law, the Special Counsel is an attorney appointed by the President, and can

only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Unlike current law, this section specifically requires that the Special Counsel be an individual who is especially qualified to carry out the functions of the position.

Section 1212 lays out the powers of the Special Counsel. This is a new section, although it is similar in several respects to current practice.

Subsection (a) requires the OSC to protect employees, former employees, and applications for employment from prohibited personnel practices. The OSC shall also, where appropriate, petition the MSPB for stays and corrective action, and file recommendations for disciplinary action with the MSPB. The OSC shall receive, review, and, where appropriate, forward to the appropriate agencies disclosures of waste, fraud and abuse. The OSC shall review OPM rules and regulations and file a written complaint with the MSPB if the rules or regulations require the commission of a prohibited personnel practice. The OSC must also investigate and, where appropriate, bring action regarding violations of other laws under the OSC's jurisdiction.

Subsection (b) grants the Special Counsel and any employee designated by the Special Counsel the authority to administer oaths, examine witnesses, take depositions, and receive evidence, and grants the Special Counsel the same subpoena authority as is granted to the MSPB under section 1204 (b), (c), and (d).

Subsection (c) allows attorneys designated by the Special Counsel to represent the OSC in any civil service brought in connection with the OSC's functions.

Subsection (d)(1) grants the Special Counsel limited authority to intervene in MSPB proceedings. Subsection (d)(2)(A) requires that in appeals before the MSPB brought by individual employees, the Special Counsel can only intervene with the consent of that employee. An exception to subsection (d)(2)(A) is provided under subsection (d)(2)(B) which provides that the Special Counsel may intervene in employee appeals before the MSPB where the employee has been charged with committing a prohibited personnel practice or where the Special Counsel has provided the agency with a waiver (pursuant to section 1214(e)) allowing that agency to take disciplinary action against an employee under Special Counsel investigation.

Subsection (d)(3) allows the Special Counsel to obtain judicial review of any MSPB decision in which the Special Counsel is a party. This would include cases where the Special Counsel seeks disciplinary action against employees as well as where the Special Counsel seeks corrective action on behalf of employees. Under current law, the Special Counsel has no independent litigating authority.

Subsection (e) is the same as current law and grants the Special Counsel the authority to appoint the necessary personnel without any approval or supervision by OPM or the Executive Office of the President.

Subsection (f) is the same as current law and allows the Special Counsel to prescribe regulations governing matters under OSC jurisdiction.

Subsection (g) is the same as current law and prohibits the Special Counsel from issuing any advisory opinion concerning any law, rule or regulation, with the exception of advisory opinions on Hatch Act matters.

Subsection (h) is a new provision prohibiting the Special Counsel from responding to any inquiry or providing information concerning any person making an allegation of a prohibited personnel practice under section 1214 except in accordance with the Privacy Act or as required by other statutes, except that the OSC cannot respond to any personnel inquiry without the consent of the employee. By restricting the kind of information that the OSC can disclose without a complainant's consent, this subsection is intented to assure complainants that communications between them and the OSC will remain confidential.

Section 1213 speels out procedures for the OSC's receipt and processing of disclosures of illegality, abuse, and other matters. This is a new provision, although it is similar in many respects to the OSC's current authority.

Subsection (a) states that this section refers to disclosures which an employee, former employee or applicant for employment reasonably believes evidences a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Current law concerns "mismanagement," not "gross mismanagement." The word "gross" is added to establish a de minimus standard for allegations of mismanagement. Also, current law covers only disclosures made by employees and applicants for employment. This subsection expands current law to include disclosures made by former employees. Any such disclosure can be made to the Special Counsel, to an Inspector General, or to another employee designated by an agency to receive such disclosures. Disclosures made to any other individuals are only covered by this section if they are not specifically prohibited by law or required by Executive Order to be kept secret.

Subsection (b) is the same as current law and requires the OSC to receive and review such disclosures and to determine within 15 days whether there is a substantial likelihood that the disclosure is valid.

Subsection (c) requires that when the OSC determines that there is a substantial likelihood that the disclosure is valid, then the OSC must promptly transmit the information to the appropriate agency head and require that the agency head conduct an investigation and submit a written report within 60 days. This subsection specifies that the OSC may only require an agency investigation under this subsection if the information was transmitted to the OSC by an employee, former employee or applicant for employment in the agency which the information concerns, or an employee who obtained the information in connection with his/her duties.

Subsection (d) is identical to current law and requires that reports by an agency head on a disclosure referred by the OSC under subsection (c) include: a summary of information, a description of the investigation, a summary of any evidence obtained, a listing of any violation of law, and a description of any action the agency plans to take as a result of the investigation.

Subsection (e) requires, as under current law, that any such report by an agency head be submitted to the OSC and that the OSC review the agency report to determine whether the agency's findings appear reasonable and whether the report contains all the information required under subsection (d) above. Unlike current law, the OSC must give the individual who made the disclosure 15 days to comment on the agency report. Also unlike current law, the OSC must then refer the agency head's report, the complainant's comments and any appropriate comments or recommendations by the OSC to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General of the General Accounting Office. Current law requires only that the agency report be submitted to the President, the Congress and the complainant, and does not specifically allow the OSC to comment on the agency head's report. This subsection also requires that whenever the OSC does not receive the agency head's report within 60 days, the OSC must transmit the information that was originally sent to the agency head to the President, the relevant congressional committees, and the Comptroller General.

Subsection (f) is identical to current law and requires that whenever evidence of a criminal violation obtained by an agency during an investigation is referred to the Attorney General, then the agency's report is not sent to the complainant, and OPM and the Office of Management and Budget (OMB) must be notified of the referral to the Attorney General.

Subsection (g) is a new section. (g)(1) permits the Special Counsel to refer to appropriate agency heads disclosures made by persons other than an employee, former employee or applicant for employment in the agency which the information concerns, or by an employee who obtained the information in connection with his duties. If the OSC refers such information to an agency head, the agency head must report in writing to the OSC within a reasonable time on what action has been or is being taken on the disclosure and when such action will be completed. The OSC shall inform the complainant of the agency head's report; if the disclosure is made anonymously, then the OSC obviously is not bound to inform the complainant of the agency head's report.

Subsection (g)(2) requires that if the OSC receives a disclosure from an appropriate employee, former employee or applicant but does not reach a determination that there is a substantial likelihood the disclosure is valid, then the OSC may refer that disclosure to the appropriate agency head if the person making the disclosure consents to the referral. If a referral is made, the agency head must report in writing to the OSC within a reasonable time on what action has been or is being taken on the disclosure and when such action will be completed.

Subsection (g)(3) states that is an individual does not consent to the referral of information to an agency head under subsection (g)(2), then the OSC must return any documents or other matter the individual provided and inform the individual of other offices available for receiving disclosures, should the individual wish to pursue the matter. The "other offices available" need not include

every conceivable other office, but should be sufficient to be helpful to the individual.

Subsection (h) states that the Special Counsel may not disclose the identity of an employee, former employee, or applicant for employment whose disclosure is referred to an agency head unless the individual consents or unless the OSC determines the disclosure of the individual's identity is necessary in order to carry out the OSC's functions. It is expected that the OSC would disclose an individual's identity against that person's wishes only in very rare, unusual situations, and only when absolutely necessary. The OSC may only disclose the identity of an employee, former employee, or applicant for employment whose disclosure is not acted upon (as described under subsection (g)(3)) unless the individual consents or unless it is deemed necessary for reasons of public health and safety or law enforcement.

Subsection (i) is identical to current law and clarifies that this section is not intended to authorize the disclosure of any information which is prohibited by law or Executive Order.

Subsection (j) is identical to current law and requires that when the OSC receives a disclosure which is specifically prohibited by law or Executive Order, the OSC must refer the information to the Senate and House Intelligence Committees.

Subsection (k) is similar to current law and requires the OSC to maintain a public list of all noncriminal matters referred to agency heads and the agency heads' responses.

Section 1214 establishes the OSC's procedures for investigating prohibited personnel practices and for petitioning the MSPB for corrective action. It is a new section, although some provisions, as noted, are the same as or are very similar to current law.

Subsection (a)(1)(A) requires the OSC to receive and investigate any allegation of a prohibited personnel practice to the extent necessary to determine if there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken.

Subsection (a)(1)(B) requires the Special Counsel, within 15 days of receiving an allegation of a prohibited personnel practice, to inform, in writing, the person making the allegation that the allegation has been received and to provide the name of a person at OSC who shall serve as a contact with the person who made the allegation.

Subsection (a)(1)(C) requires the Special Counsel, within 60 days of the first notice to a complainant, to notify the person making the allegation of the status of the investigation and of any action taken by the OSC since the initial filing of the allegation, unless the Special Counsel decides to terminate the investigation. The OSC must continue to notify the person at least every 60 days thereafter of the status of the ongoing investigation and of any action taken by the OSC since the previous notice. OSC can notify the person more frequently if appropriate. This subsection is intended to ensure that investigations proceed in relatively expeditious manner, and that complainants receive regular updates of the status of their cases. Current law requires no such notices to the complainant, nor does it impose such timetables on the OSC.

Subsection (a)(2) requires that when the OSC terminates an investigation, the OSC must transmit to the complainant a written

notification of the termination of the investigation, as well as a summary of relevant facts ascertained by the OSC, including those which support and those which do not support the complainant's allegations, and the reasons for terminating the investigation. This differs from current law in that current law does not require that the OSC provide the complainant with a summary of relevant facts ascertained by the OSC.

Subsection (a)(3) allows employees, former employees, or applicants for employment to appeal directly to the MSPB if they allege a prohibited personnel practice as defined under 2302(b)(8) USC 5 (reprisal for whistleblowing), if they appeal first to the OSC, and if the OSC subsequently terminates the investigation of their case or if they have not been notified within 90 days of filing an allegation that the OSC shall seek corrective action on their behalf. This does not affect those individuals who already have the right to appeal directly to the MSPB under current law, rule or regulation.

Subsection (a)(4) allows the Special Counsel, with the individual's consent, to continue seeking corrective action on behalf of an individual even if the individual decides to seek corrective action directly from the Board, as permitted under subsection (a)(3) and section 1221. However, the Special Counsel is not obligated to continue an investigation if an individual decides to seek corrective action directly from the Board. That is, this subsection allows the Special Counsel the discretion of terminating an investigation if the individual decides to pursue corrective action on his or her own before the MSPB. Also, if several employees bring a joint complaint, and one employee does not want the OSC's assistance, the OSC may still continue to seek corrective action for the other employees.

Subsection (a)(5) is the same as current law and allows the Special Counsel to conduct investigations in the absence of an allegation to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred.

Subsection (b)(1) grants the OSC authority to request the MSPB to issue a "stay", or temporary halt, of a personnel action against an employee for 45 days. Any member of the MSPB must grant the stay unless the member determines that such a stay would not be appropriate. Unless a stay is denied, it must be granted within 3 calendar days of the Special Counsel's request. The MSPB may extend a stay for any period which the MSPB considers appropriate and may allow the agency involved to comment when considering extending a stay. The Board may not terminate a stay on its own motion or that of the agency involved unless it first provides notice and an opportunity for a hearing to the OSC and the affected individual; the Board may not terminate a stay on the OSC's motion unless it first provides notice and an opportunity for a hearing to the affected individual.

Subsection (b)(2) requires that if in connection with any investigation, the OSC determines there are reasonable grounds to believe a prohibited personnel practice has occurred, the OSC shall report the determination to the Board, the agency involved and OPM, and may report it to the President. If the agency does not correct the prohibited personnel practice, the OSC may petition the Board for corrective action. This is the same as current law. If the OSC finds,

in consultation with the complainant, that the agency has corrected the prohibited personnel practice, then the OSC must file its findings with the MSPB along with any written comments the complainant wishes to provide. In such a case, the investigation of the case would be considered terminated, and the individual would have the right to appeal to the MSPB under subsection (a)(3) and section 1221 (e.g., a complainant might choose to appeal to the MSPB if s/he disagreed with the OSC's findings that the agency had corrected the prohibited personnel practice). Current law does not require that the complainant's written comments be included when the OSC files findings that an agency has corrected a prohibited personnel practice.

Subsection (b)(3)(A) requires that whenever the OSC petitions for corrective action, the MSPB must allow the OSC, the agency involved and OPM an opportunity for oral and written comments, and the individuals involved an opportunity for written comments. Current law does not require that the individual involved be provided an opportunity to comment.

Subsection (4)(A) requires the Board to order such corrective action as the Board considers appropriate if the Special Counsel proves a prohibited personnel practice, other than reprisal for whistleblowing (as defined under 2302(b)(8) USC 5), has occurred, exists, or is to be taken.

Subsection (4)(B) requires that for cases of alleged reprisal for whistleblowing (as defined-unde 2302(b)(8) USC 5), the Board shall order appropriate corrective action if the Special Counsel demonstrates that an individual's disclosure of waste, fraud, or abuse played any part in a personnel action taken against that individual. One of the ways in which the Special Counsel may demonstrate that an individual's disclosure was a factor in a personnel action is by showing that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a time period such that a reasonable person could conclude that the disclosure was a factor in the personnel action. However, corrective action shall not be ordered if the agency demonstrates by clear and convincing evidence that a personnel action taken against an alleged whistleblower is justified on a basis independent of that individual's protected disclosure, and that the disclosure was not a material factor in the personnel action.

Under current case law, the Special Counsel has to prove that an alleged whistleblower's disclosure was a "significant" or "predominant" factor in a personnel action; this subsection lessens this burden by requiring that the Special Counsel prove only that the disclosure was "a factor." Under this subsection, the burden then shifts to the agency to show that an employee's protected disclosure was not a "material factor" in the personnel action; the agency must show this by "clear and convincing" evidence. By requiring that reprisal can not by a material factor in a personnel action against an employee, and by requiring that agencies prove their case by a higher standard of "clear and convincing evidence" rather than "a preponderance of evidence," this subsection revises the so-called *Mt. Healthy* test which has been applied by the Board to reprisal cases in recent years.

Subsection (c) requires that if, in connection with an investigation, the OSC determines that a criminal violation has occurred, the OSC must report that to the Attorney General, the relevant agency head, OPM and OMB. If the OSC determines that a prohibited personnel practice also exists, the OSC must proceed with any investigation or proceeding unless the Attorney General is actively pursuing an investigation. If the Attorney General is actively pursuing an investigation, the OSC may proceed with its own investigation at the Special Counsel's discretion. This subsection ensures that an OSC investigation will continue if the Department of Justice declines to pursue a related criminal matter.

Subsection (d) is identical to current law and requires that when the OSC, in the course of any investigation, determines that there are reasonable grounds to believe a violation of law, rule or regulation has occurred other than any prohibited personnel practice referred to in subsection (b) or any criminal violation referred to subsection (d), then the OSC must refer the violation to the relevant agency head. That agency head must provide the OSC a certification, within 30 days, which states that the agency head has personally reviewed the agency's report on the alleged violation and which states any action the agency is taking regarding the violation.

Subsection (e) is identical to current law and prohibits agencies from taking disciplinary action against any employee who is under an OSC investigation for any prohibited activity, unless such disciplinary action is approved by the OSC.

Subsection (f) states that nothing under section 1214 precludes an individual from seeking corrective action directy from the Board as provided under section 1221.

Section 1215 prescribes procedures regarding disciplinary actions against employees. As noted, it is very similar to current law.

Subsection (a)(1) is similar to current law, and requires that when the OSC determines that disciplinary action should be taken against an employee for committing a prohibited personnel practice, violating a law, rule or regulation or engaging in other conduct under the OSC's jurisdiction, or knowingly and willfully not complying with a MSPB order, then the OSC shall present a written complaint with supporting facts to the MSPB.

Subsection (a), paragraphs (2), (3), (4), and (5) are identical to current law. These paragraphs: list the rights of an employee who is the subject of a complaint before the MSPB; list the disciplinary actions the MSPB may impose; grant judicial review to an employee who is the subject of an MSPB order imposing disciplinary action; and require that, in cases involving state or local officers of employees, the Board shall consider the case in accordance with the appropriate law.

Subsection (b) is identical to current law and requires the OSC not to bring disciplinary action against certain personnel in confidential and policy-making positions, but rather to refer the relevant information regarding such personnel to the President for appropriate action.

Subsection (c) is a new subsection which allows the OSC to refer recommendations for disciplinary action against members of the uniformed services or contractor personnel to the appropirate fed-

eral agency head. Whenever the OSC refers such recommendations, the agency head must report back to the OSC within 60 days on each recommendation and the action taken.

Section 1216 is identical to current law, and describes the other areas of OSC's jurisdiction.

Subsection (a) grants the OSC power to investigate violations of the Hatch Act or the Freedom of Information Act, other activities prohibited by civil service law, rule, or regulation, and involvement by any employee in any prohibited discrimination. (Section 1215 provides the OSC with the authority to petition the MSPB for disciplinary action against an individual who is the subject of an investigation under this section.)

Subsection (b) states that the OSC must not investigate any allegation of the last two categories listed under subsection (a) if the OSC determines the allegation may be resolved more appropriately under an administrative appeals procedure.

Section 1217 is a new section which grants the OSC the same power the MSPB has under current law. Under this section, the OSC may transmit information upon request to Congress without review, clearance, or approval by other administrative authority.

Section 1218 is identical to current law and requires the OSC to submit an annual report to Congress.

Subchapter III—Individual Right of Action

Section 1221 is a new section and describes the right of action provided to certain individuals alleging prohibited personnel practices.

Section (a) allows employees, former employees, and applicants for employment to seek corrective action before the MSPB subject to subsection (b) and 1214(a)(3). Employees, former employees, and applicants for employment may appeal directly to the MSPB if they allege a prohibited personnel practice as defined under 2303 (b)(8) USC 5 (reprisal for whistleblowing), if they appeal first to the OSC, and if the OSC subsequently terminates the investigation of their case or if they have not been notified within 90 days of filing an allegation that the OSC shall seek corrective action on their behalf. Under current law, there are a number of situations for which an alleged whistleblower's only route of appeal is the OSC; this provision is intended to allow whistleblowers who suffer reprisal the further right of appeal to the MSPB once the OSC route is exhausted.

Subsection (b) states this section does not prohibit any individual from appealing to the MSPB if that individual has the right to appeal directly to the MSPB under any existing law, rule, or regulation. For example, a non-probationary employee who is the subject of an adverse action, such as removal, would have his/her right under current law to appeal directly to the MSPB unaffected by this Act.

Subsection (c) grants alleged whistleblowers seeking corrective action before the MSPB the authority to request a stay of the personnel action involved. The MSPB must grant the stay within 10 days of the request if the MSPB determines that such a stay would be appropriate. The Board shall allow any agency which would be

subject to a stay to comment to the Board on the stay request. The stay continues in effect for such period as the Board determines to be appropriate. The MSPB can dissolve or modify a stay at any time if the Board determines that would be appropriate.

Subsection (d) establishes that at the request of the individual seeking corrective action, the Board may issue a subpoena for witnesses or the production of evidence. The subpoena shall be issued and enforced in the manner described in section 1204 for Board subpoenas.

Subsection (e) parallels 1214(b)(4)(B). Subsection (e) requires that for cases of alleged reprisal for whistleblowing, the Board shall order appropriate corrective action if the individual demonstrates that his/her disclosure of waste, fraud, or abuse played any part in a personnel action taken against that individual. One of the ways in which an individual may demonstrate that his/her disclosure was a factor in a personnel action is by showing that the offical taking the personnel action knew of the disclosure and that the personnel action occurred within a time period such that a reasonable person could conclude that the disclosure was a factor in the personnel action. However, corrective action shall not be ordered if the agency demonstrates by clear and convincing evidence that a personnel action taken against an individual is justified on a basis independent of that individuals's protected disclosure, and that the disclosure was not a material factor in the personnel action.

Under current case law, alleged whistleblowers have to prove that a disclosure was a "significant" or "predominant" factor in a personnel action; this subsection lessens this burden by requiring that they prove only that the disclosure was "a factor." Under this subsection, the burden then shifts to the agency to show that an employee's protected disclosure was not a "material factor" in the personnel action; the agency must show this by "clear and convincing" evidence. By requiring that reprisal can not be a material factor in a personnel action against an employee, and by requiring that agencies prove their case by a higher standard of "clear and convincing evidence" rather than "a preponderance of evidence," this subsection revises the so-called *Mt. Healthy* test which has been applied by the Board to reprisal cases in recent years.

Subsection (f) requires that a decision by the Special Counsel to terminate an investigation of an individual's complaint shall not be considered in any case brought by the individual under this section. This subsection is intended to ensure that a complaintant's case before the Board or in court is not prejudiced by any OSC decision to decline a case.

Subsection (g) requires that when an individual prevails before the Board and the Board's decision is based on a finding of a prohibited personnel practice, the agency involved must be liable to the individual for reasonable attorney's fees and other costs incurred. Current law permits the MSPB to order the agency to pay attorney's fees when the MSPB determines that such payment by the agency is warranted in the interest of justice.

Subsection (h) provides the right of judicial review for any individual adversely affected by a MSPB decision. This is the same right available under current law for individuals who currently have the right to appeal directly to the MSPB.

Subsection (i) provides that this section applies to individuals who appeal to the MSPB under section 7513(d) (which covers adverse actions such as demotions or removals) if a prohibited personnel practice as defined under 2302(b)(8) USC 5 (reprisal for whistleblowing) is alleged.

Subsection (j) provides that employees may appeal personnel actions taken against them even if they have elected to receive retirement benefits. Under current law, employees who elect to receive retirement benefits are precluded from appealing personnel actions taken against them.

Section 4 of this Act pertains to judicial review of MSPB decisions.

Subsection (a) amends 7703(b) of USC 5 to allow federal employees, former employees or applicants for employment alleging reprisal for whistleblowing (as defined under 2302 (b)(8) to appeal Board decisions to either the Federal Circuit Court or to the court of appeals for the judicial circuit within which the petitioner resides. Other federal employees appeals of Board decisions would continue to go only to the Federal Circuit Court.

Section 5 of this Act amends the definition of prohibited personnel practices.

Subsection (a) amends part of 2302(b)(8) USC 5 (reprisal for whistleblowing) to read "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—"; this would replace current law which reads "take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—". The phrase "threaten to take or fail to take" is added to prohibit employers from threatening to take prohibited actions against alleged whistleblowers, and to allow alleged whistleblowers to seek assistance if they are the subject of such threats. The phrase "because of" is substituted for "as a reprisal for" because the word "reprisal" could imply that it must be proved that an employer's intent in taking a personnel action against an individual was harmful. This subsection clarifies that it is prohibited for an employer, regardless of his/her motive, to take action against a whistleblower because of that whistleblower's disclosure.

Subsection (a) also amends the definition of protected conduct under 2302(b)(8) to refer to disclosures of "gross mismanagement"; current law refers to disclosures of "mismanagement." The qualifier "gross" is added to establish a de minimus standard for mismanagement disclosures. This subsection also changes the phrase "a disclosure" to "any disclosure" in terms of the definition of authorized disclosures for which employees are protected.

Subsection (b) amends part of 2302(b)(9) USC 5 to parallel some of the changes noted in subsection (a) and to read "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—"; this would replace current law which reads "take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—". This subsection also expands the definition of protected conduct to include testifying for or otherwise lawfully assisting any individual in the exercise of any appeal

right, and cooperating with or disclosing information to an Inspector General or to the OSC.

Section 6 of this Act would allow whistleblowers to be given preference in obtaining transfers.

Subsection (a) amends section 3352 of title 5. This subsection allows the heads of federal agencies to give preference in granting transfers to qualified employees who are found by the Board to have been subject to a prohibited personnel practice as described under section 2302(b)(8) of title 5 (reprisal for whistleblowing). Such employees may seek a transfer to any position in the competitive or excepted service. If the agency rejects the transfer application, the head of the agency shall provide the reasons why in writing to both the employee and the Board. This preference in obtaining transfers only applies for one transfer and only within 18 months of the MSPB's decision. This section would not supersede the preference currently available to veterans.

Subsection (b) is a technical amendment implementing subsection (a).

Section 7 of this Act provides interim relief for certain appellants to the Board.

This section would amend section 7701 of title 5 to provide that employees or applicants who win an appeal before a regional office of the Board be granted the relief ordered by the deciding official pending any further appeal to the full Board. Two exceptions to this are provided. Relief will not be granted if the deciding Board official determines that granting such relief would not be appropriate; in addition, an employee need not be returned to the workplace if the employing agency determines that returning that employee to the workplace would be unduly disruptive. If the employing agency determines that an employee should not be returned to the workplace, the employee will nevertheless receive the pay and benefits s/he would receive if s/he were working. This new section does not require that any awarded back pay or attorney's fees be paid before a decision is final before the full Board. This section is a change to current law in that under current law, employees are not granted any relief ordered by a regional office of the Board until they win at the full Board.

Section 8 of this Act provides that this Act does not limit any rights or remedies that are otherwise available to any person.

Section 9 of this Act provides some technical provisions designed to clarify that pending actions by or against the MSPB and OSC shall not be affected by enactment of this Act.

Subsection (a) requires that orders, rules and regulations issued by the MSPB or the OSC before the date of enactment shall continue in effect.

Subsection (b) requires that any administrative proceedings pending at the time of enactment of this Act shall not be affected by any provision of this Act.

Subsection (c) provides that no suits, actions or other proceedings lawfully commenced by or against the MSPB or the OSC shall abate because of enactment of this Act.

Section 10 of this Act provides funding authorization for the MSPB and OSC.

Subsection (a) authorizes $20,000,000 for the MSPB for each of the years 1989, 1990, 1991, 1992 and 1993 and $5,000,000 for the OSC for each of the years 1989, 1990, and 1991. This subsection will require Congress to take affirmative action to continue funding for the MSPB and OSC.

Subsection (b) is a technical amendment clarifying that no funds are appropriated to the MSPB or the OSC under the Civil Service Reform Act; funds will be appropriated instead in accordance with subsection (a).

Subsection (c) transfers all the personnel, assets, liabilities, and interests from the currently existing Special Counsel of the MSPB to the proposed newly independent OSC as created under section 1211 of this Act.

Section 11 is technical and conforming amendments inserting the newly numbered sections of this Act into the necessary and appropriate places in other statutes.

Section 12 amends 7703(a)(2) of USC 5 to provide that the relevant agency be the named respondent in employee appeals of Board decisions where the appeal involves the underlying personnel action or a request for attorney fees. In appeals involving procedural or jurisdictional matters, the Board would be the respondent.

Section 13 establishes the effective date of this Act as 90 days after enactment.

VII. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 24, 1988.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 508, the Whistleblower Protection Act of 1988, as ordered reported by the Senate Committee on Governmental Affairs, May 19, 1988.

The bill would establish the Office of Special Counsel as an independent agency and would clarify that its primary role is to protect federal employees who claim to be victims of prohibited personnel practices. Under current law, the Office of Special Counsel is established as part of the Merit Systems Protection Board (MSPB).

The bill also would create an individual right of action so employees facing reprisals can seek stays and corrective action directly from the MSPB if the Special Counsel has not taken action. In addition, S. 508 would require agencies to pay attorney fees to employees who successfully show that a prohibited personnel practice was taken against them.

The bill would authorize the appropriation of $20 million to the MSPB for each of the fiscal years 1989 through 1993 and $5 million to the Office of Special Counsel for each of the fiscal years 1989, 1990, and 1991. The bill also would remove the permanent, indefinite authorization that is currently in effect for these entities. In 1988, the MSPB received an appropriation of $21.0 million, and the

Office of Special Counsel received $4.5 million. The President's budget for 1989 includes a request of $20.5 million for the MSPB and $4.7 million for the Office of Special Counsel.

Because the bill would replace the permanent, indefinite authorization currently in effect for the MSPB and the Office of Special Counsel with a definite authorization that would expire in 1993 and 1991, respectively, the new authorizations would result in no new cost to the federal government. Relative to the CBO baseline estimates for the two activities, which inflate 1988 appropriation levels to account for future price increases, the authorizations provided by S. 508 would be about $2 million less in 1989, and would be about $7 million less by 1993.

Because S. 58 would require agencies to pay attorney fees when employees win lawsuits regarding prohibited personnel practices, enactment of the bill would result in higher costs to agencies. Under current law, agencies pay attorney fees only when the MSPB judges that such payment is warranted. S. 508 would remove this discretion. As a result, payment of attorney fees is likely to become more frequent, although it is difficult to estimate with precision the amount of these additional costs. No historical data are available regarding the amount of attorney fees paid under current law or the number of prohibited personnel practice cases won by employees. However, because there are relatively few such cases (less than 50 per year), the amount of additional attorney fees that would be paid under S. 508 would probably not exceed $1 million per year.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM, *Acting Director.*

VIII. REGULATORY IMPACT OF LEGISLATION

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out the bill."

S. 508 would have very limited regulatory impact. The bill would require the MSPB to prescribe regulations under which any employee aggrieved by another employee's failure to comply with an order of the Board may petition the Board to exercise its authority. The Board already has the authority under current law to mandate withholding the salary of any employee who fails to comply with an order of the Board. S. 508 would simply allow employees the opportunity to petition the Board to exercise its current authority to enforce its own orders.

In addition, S. 508 would provide, as does current law, the Board and the OSC with the authority to prescribe regulations necessary to carry out their functions. It is possible the Board and the OSC may need to modify existing regulations or prescribe additional ones because of the changes required under S. 508, but such modifications or additions would have only a modest regulatory impact.

IX. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATOR TED STEVENS

In joining with my colleagues to report the bill, S. 508, to the Senate, I made it clear that I continue to have several concerns about specific provisions in this measure. Those concerns were raised with the Committee when this bill was reported and were the subject of a letter from the Office of Management and Budget dated May 18, 1988. Because these concerns have not been addressed to my satisfaction, I intend to offer several amendments to S. 508 when the bill is considered by the Senate.

While I wholeheartedly support protection for federal employees who disclose, or "blow the whistle" on, government mismanagement of fraud, I am concerned that the bill, as reported, may hinder managers from taking disciplinary action for legitimate reasons. Additionally, because Congress established the U.S. Court of Appeals for the Federal Circuit for the express purpose of adjudicating federal employee "whistleblower" and prohibited personnel practice cases, we should not reverse this determination by permitting employees to choose their venue in whistleblower cases.

The specific provisions of this bill which concern me are as follows:

Court Venue.—Despite the provisions of the Federal Courts Improvement Act of 1982 creating the U.S. Court of Appeals for the Federal Circuit and laying venue for prohibited personnel cases in that court, S. 508 provides Federal employees alleging reprisal for whistleblowing the right to pursue their appeal of a Merit Systems Protection Board (MSPB) decision with either the U.S. Court of Appeals for the Federal Circuit *or* the court of appeals in the circuit where the petitioner resides. This change will likely encourage "forum shopping", cause jurisdictional confusion among the circuits and ultimately will force "whistleblower" cases onto an already overcrowded Supreme Court docket. Of equal importance, Federal employees living in different geographic regions may be treated differently under what is supposed to be one unified Civil Service system.

Agency Defense.—Under current law, if an employee succeeds in proving a "nexus" between his protected disclosure activity and the personnel action taken against him by the agency, the agency must prove by a preponderance of the evidence in its affirmative defense that it would have taken the personnel action even if the employee had not engaged in protected activity. This standard of proof was established by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle* (429 U.S. 274 (1977)) and has been applied by MSPB and the courts to reprisal cases. S. 508, as reported,

has failed to maintain an appropriate balance between the need to assure effective management and the need to protect "whisleblowers". The bill would impose a higher burden of proof by requiring the agency to show by "clear and convincing evidence" that the whistleblowing was not a "material factor" in the personnel action. Such a standard of proof may create a level of immunization for "whistleblowers" because managers will be unable to take an appropriate and legitimate action in cases where it is justified.

OSC's Responsibility to Whistleblowers.—The reported bill provides in section 2, Statement of Purposes, that the Office of Special Counsel shall act in the interests of employees seeking their assistance and *not contrary to such interests.* The Committee properly expects OSC to vigorously protect individuals seeking their help; however, requiring OSC to protect alleged "whistleblowers" even if wrongdoing by the whistleblower can be substantiated, clearly serves neither the legitimate "whistleblower" or the public.

These three concerns are not difficult to fix and will result in a better bill. No one wishes to see this bill vetoed. Individuals willing to speak out against fraud and waste within the federal government are a vital link to the efficient and effective conduct of business and must not be victimized for reporting such abuse. However, I am particularly concerned that the legal standard of review adopted by this bill, as reported, may immunize employees who blow the whistle from appropriate, legitimate disciplinary actions.

TED STEVENS.

X. CHANGES IN EXISTING LAWS

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 908, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * * * *

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD AND SPECIAL COUNSEL

Sec.
[1201. Appointment of members of the Merit Systems Protection Board.
[1202. Term of office; filling vacancies; removal.
[1203. Chairman; Vice Chairman.
[1204. Special Counsel; appointment and removal.
[1205. Powers and functions of the Merit Systems Protection Board and Special Counsel.
[1206. Authority and responsibilities of the Special Counsel.
[1207. Hearings and decisions on complaints filed by the Special Counsel.
[1208. Stays of certain personnel actions.
[1209. Information.

[§ 1201. Appointment of members of the Merit Systems Protection Board

[The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The Chairman and members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

[§ 1202. Term of office, filling vacancies; removal

[(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

[(b) A member appointed to fill a vacancy occurring before the end of a term of office of his predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201 of this title. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

[(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

[(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

[§ 1203. Chairman; Vice Chairman

[(a) The President shall from time to time, appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

[(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

[(c) During the absence or disability of both the Chairman and Vice Chairman, or when the office of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

[§ 1204. Special Counsel; appointment and removal

[The Special Counsel of the Merit Systems Protection Board shall be appointed by the President from attorneys, by and with the advice and consent of the Senate, for a term of 5 years. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of his predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

[§ 1205. Powers and functions of the Merit Systems Protection Board and Special Counsel

[(a) The Merit Systems Protection Board shall—

[(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

[(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

[(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequatly protected; and

[(4) review, as provided in subsection (e) of this section, rules and regulations of the Office of Personnel Management.

[(b)(1) Any member of the Merit Systems Protection Board, the Special Counsel, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witneses, take depositions, and receive evidence.

[(2) Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title may—

[(A) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia; and

[(B) order the taking of depositions and order responses to written interrogatories.

[(3) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

[(c) In the case of contumacy or failure to obey a subpena issued under subsection (b)(2) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the

order of the court may be punished by the court as a contempt thereof.

[(d)(1) In any proceeding under subsection (a)(1) of this section, any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

[(2) In enforcing compliance with any order under subsection (a)(2) of this section, the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

[(3) In carrying out any study under subsection (a)(3) of this section, the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office and may require additional reports from other agencies as needed.

[(e)(1) At any time after the effective date of any rule or regulation issued by the Director in carrying out functions under section 1103 of this title, the Board shall review any provision of such rule or regulation—

[(A) on its own motion;

[(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

[(C) on the filing of a written complaint by the Special Counsel requesting such review.

[(2) In review any provision of any rule or regulation pursuant to this subsection the Board shall declare such provision—

[(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title; or

[(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b) of this title.

[(3)(A) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

[(B) Any review conducted by the Broad pursuant to this subsection shall be limited to determining—

[(i) the validity on its face of the provision under review; and

[(ii) whether the provision under review has been validly implemented.

[(C) The Board shall require any agency—

[(i) to cease compliance with any provision of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

[(ii) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

[(f) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

[(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

[(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

[(i) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33 of this title).

[(j) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

[(k) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

[§ 1206. Authority and responsibilities of the Special Counsel

[(a)(1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

[(2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reason therefor.

[(3) In addition to authority granted under paragraph (1) of this subsection, the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining

whether there are reasonable grounds to believe that a prohibited personnel practice has occured, exists, or is to be taken.

[(b)(1) In any case involving—

[(A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences—

[(i) a violation of any law, rule, or regulation; or

[(ii) mismanagement, a gross waste of funds, an abuse of a authority, or a substantial and specific danger to public health or safety;

if the disclosure is not specifically prohibited by law and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

[(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences—

[(i) a violation of any law, rule, or regulation; or

[(ii) mismanagement, a gross waste of funds, an abuse of authority; or a substantial and specific danger to public health or safety;

the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this section or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel.

[(2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

[(3)(A) In the case of information received by the Special Counsel under paragraph (1) of this section, if, after such review as the Special Counsel determines practicable (but not later than 15 days after the receipt of the information), the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety, the Special Counsel may, to the extent provided in subparagraph (B) of this paragraph, require the head of the agency to—

[(i) conduct an investigation of the information and any related matters transmitted by the Special Counsel to the head of the agency; and

[(ii) submit a written report setting forth the findings of the head of the agency within 60 days after the date on which the information is transmitted to the head of the agency or within any longer period of time agreed to in writing by the Special Counsel.

[(B) The Special Counsel may require an agency head to conduct an investigation and submit a written report under subparagraph

(A) of this paragraph only if the information was transmitted to the Special Counsel by—

[(i) any employee or former employee or applicant for employment in the agency which the information concerns; or

[(ii) any employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

[(4) Any report required under paragraph (3)(A) of this subsection shall be reviewed and signed by the head of the agency and shall include—

[(A) a summary of the information with respect to which the investigation was initiated;

[(B) a description of the conduct of the investigation;

[(C) a summary of any evidence obtained from the investigation;

[(D) a listing of any violation or apparent violation of any law, rule, or regulation; and

[(E) a description of any corrective active taken or planned as a result of the investigation, such as—

[(i) changes in agency rules, regulations, or practices;

[(ii) the restoration of any aggrieved employee;

[(iii) disciplinary action against any employee; and

[(iv) referral to the Attorney General of any evidence of a criminal violation.

[(5)(A) Any such report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant. Whenever the Special Counsel does not receive the report of the agency head within the time prescribed in paragraph (3)(A)(ii) of this subsection, the Special Counsel may transmit a copy of the information which was transmitted to the agency head to the President and to the Congress together with a statement noting the failure of the head of the agency to file the required report.

[(B) In any case in which evidence of a criminal violation obtained by an agency in an investigation under paragraph (3) of this subsection is referred to the Attorney General—

[(i) the report shall not be transmitted to the complainant; and

[(ii) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

[(6) Upon receipt of any report of the head of any agency required under paragraph (3)(A)(ii) of this subsection, the Special Counsel shall review the report and determine whether—

[(A) the findings of the head of the agency appear reasonable; and

[(B) the agency's report under paragraph (3)(A)(ii) of this subsection contains the information required under paragraph (4) of this subsection.

[(7) Whenever the Special Counsel transmits any information to the head of the agency under paragraph (2) of this subsection but does not require an investigation under paragraph (3) of this subsection, the head of the agency shall, within a reasonable time after the information was transmitted, inform the Special Counsel,

in writing, of what action has been or is to be taken and when such action will be completed. The Special Counsel shall inform the complainant of the report of the agency head.

[(8) Except as specifically authorized under this subsection, the provisions of this subsection shall not be considered to authorize disclosure of any information by any agency or any person which is—

[(A) specifically prohibited from disclosure by any other provision of law; or

[(B) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

[(9) In any case under subsection (b)(1)(B) of this section involving foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

[(c)(1)(A) If, in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office, and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

[(B) If, after a reasonable period, the agency has not taken the corective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

[(2)(A) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

[(B) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel may proceed with any investigation or proceeding instituted under this section notwithstanding that the alleged violation has been reported to the Attorney General.

[(3) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred which is not referred to in paragraph (1) or (2) of this subsection, the violation shall be reported to the head of the agency involved. The Special Counsel shall require, within 30 days of the

receipt of the report by the agency, a certification by the head of the agency, which states—

[(A) that the head of the agency has personally reviewed the report; and

[(B) what action has been, or is to be, taken, and when the action will be completed.

[(d) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsections (b)(3)(A) and (c)(3) of this section, together with—

[(1) reports by the heads of agencies under subsection (b)(3)(A) of this section, in the case of matters referred under subsection (b); and

[(2) certifications by heads of agencies under subsection (c)(3), in the case of matters referred under subsection (c).

The Special Counsel shall take steps to ensure that any public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

[(e)(1) In addition to the authority otherwise provided in this section, the Special Counsel shall, except as provided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

[(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

[(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

[(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

[(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

[(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

[(2) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraph (1)(D) or (1)(E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

[(f) During any investigation initiated under this section, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

[(g)(1) Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—

[(A) after any investigation under this section, or

[(B) on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

[(2) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in paragraph (1) of this subsection, together with any response by the employee, shall be presented to the President for appropriate action in lieu of being presented under section 1207 of this title.

[(h) If the Special Counsel believes there is a pattern of prohibited personnel practices and such practices involve matters which are not otherwise appealable to the Board under section 7701 of this title, the Special Counsel may seek corrective action by filing a written complaint with the Board against the Agency or employee involved and the Board shall order such corrective action as the Board determines necessary.

[(i) The Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board and the Special Counsel shall not have any right of judicial review in connection with such intervention.

[(j)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

[(2) Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under sections 3324 or subchapter VIII of chapter 33 of this title).

[(k) The Special Counsel may prescribe regulations relating to the receipt and investigation of matters under this jurisdiction of the Special Counsel. Such regulations shall be published in the Federal Register.

[(*l*) The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73 of this title).

[(m) The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the

recommendations and reports made by it to other agencies pursuant to this section, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this subsection shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate.

[§ 1207. Hearings and decisions on complaints filed by the Special Counsel

[(a) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under section 1206(g) of this title is entitled to—

[(1) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer:

[(2) be represented by an attorney or other representative;

[(3) a hearing before the Board or an administrative law judge appointed under section 3105 of this title and designated by the Board;

[(4) have a transcript kept of any hearing under paragraph (3) of this subsection; and

[(5) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

[(b) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

[(c) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this section may obtain judicial review of the order in the United States court of appeals for the judicial circuit in which the employee resides or is employed at the time of the action.

[(d) In the case of any State or local officer or employee under chapter 15 of this title, the Board shall consider the case in accordance with the provisions of such chapter.

[§ 1208. Stays of certain personnel actions

[(a)(1) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

[(2) Any member of the Board requested by the Special Counsel to order a stay under paragraph (1) of this subsection shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

[(3) Unless denied under paragraph (2) of this subsection, any stay under this subsection shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

[(b) Any member of the Board may, on the request of the Special Counsel, extend the period of any stay ordered under subsection (a) of this section for a period of not more than 30 calendar days.

[(c) The Board may extend the period of any stay granted under subsection (a) of this section for any period which the Board considers appropriate, but only if the Board concurs in the determination of the Special Counsel under such subsection, after an oportunity is provided for oral or written comment by the Special Counsel and the agency involved.

[§ 1209. Information

[(a) Notwithstanding any other provision of law or any rule, regulation or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommitee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

[(b) The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.]

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

Sec. 1201. Appointment of members of the Merit Systems Protection Board.
Sec. 1202. Term of office: filling vacancies; removal.
Sec. 1203. Chairman: Vice Chairman.
Sec. 1204. Powers and functions of the Merit System Protection Board.
Sec. 1205. Transmittal of information to Congress.
Sec. 1206. Annual report.

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

Sec. 1211. Establishment.
Sec. 1212. Powers and functions of the Office of Special Counsel.
Sec. 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters.
Sec. 1214. Investigation of prohibited personnel practices; corrective action.
Sec. 1215. Disciplinary action:
Sec. 1216. Other matters within the jurisdiction of the Office of Special Counsel.
Sec. 1217. Transmittal of information to Congress.
Sec. 1218. Annual report.

SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CASES INVOLVING PROHIBITED PERSONNEL PRACTICES

Sec. 1221. Individual right of action.

SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

§ 1201. Appointment of members of the Merit System Protection Board

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

§ 1202. Term of office: filling vacancies: removal

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201 of this title.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than 1 year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

§ 1203. Chairman: Vice Chairman

(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

§ 1204. Powers and functions of the Merit System Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regu-

lation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merits systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—

(A) issue subpoenas requiring the attendance and presentation of testimony of witnesses, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A), the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)(1) In any proceeding under subsection (a)(I), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(2)(A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued, and no payment shall be made out of the Treasury of the United States for any service specified in such order.

(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).

(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

(f)(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 of this title, the Board shall review any provision of such rule or regulation—

(A) on its own motion:

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

(C) on the filing of a written complaint by the Special Counsel requesting such review.

(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision—

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title; or

(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b) of this title.

(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review, pursuant to this subsection, shall have the right to participate in such review.

(4) The Board shall require any agency—

(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(g) The Board may delegate any of the administrative responsibilities of the Board under this title to any employee of the Board.

(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(i) Except as provided in section 518 of title 28, United States Code, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

§ 1205. Transmittal of information to Congress

Notwithstanding any other provision of law or any rule, regulation, or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

§ 1206. Annual report

The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

§ 1211. Establishment

(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.

(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.

§ 1212. Powers and functions of the Office of Special Counsel

(a) The Office of Special Counsel shall—

(1) in accordance with applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—

(A) bring petitions for stays, and petitions for corrective action, under section 1214 of this title; and

(B) file a complaint or make recommendations for disciplinary action under section 1215 of this title;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213 of this title, disclosures of violations of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 of this title and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216 of this title).

(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) The Special Counsel may—

(A) issue subpoenas requiring the attendance and presentation of testimony of witnesses, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

(3) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A) the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to

appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(4) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(5) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Office of Special Counsel, and represent the Office, in any civil action brought in connection with any function carried out by the Office pursuant to this title or as otherwise authorized by law.

(d)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

(2)(A) The Special Counsel may intervene in an action brought by an individual under section 1221 of this title or in an appeal brought by an employee under section 7701 of this title only with the consent of such individual or employee.

(B) Notwithstanding the provisions of subparagraph (A), the Special Counsel may intervene as a matter of right if—

(i) an employee bringing an action under section 7701 of this title or an individual bringing an action under section 1221 of this title, has been charged with conduct constituting a prohibited personnel practice as defined in section 2302(b) of this title; or

(ii) the agency initiated the contested personnel action against the individual pursuant to a waiver by the Special Counsel under section 1214(e) of this title.

(3)(A) The Special Counsel may obtain judicial review of any final order or decision of the Merit Systems Protection Board in which the Special Counsel was a party.

(B) A petition for review under this paragraph shall be filed with such court, and within such time, as provided for under section 7703(b) of this title.

(e)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the Presi-

dent (other than approval required under section 3324 or subchapter VIII of chapter 33).

(f) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

(g) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

(h)(1) The Special Counsel may not respond to any inquiry or provide information concerning any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any personnel inquiry concerning any person described under paragraph (1) without the consent of such person.

§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

(a) This section applies with respect to—

(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and

(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to received such disclosures of information which the employee, former employee, or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violaiton of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—

(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—

(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

(5) a description of any action taken or planned as a result of the investigation such as—

(A) changes in agency rules, regulations, or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of a criminal violation.

(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.

(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President, the congres-

sional committees with jurisdiction over the agency which the disclusure involves, and the Comptroller General together with a statement noting the failure of the head of the agency to file the required report.

(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

(1) the report shall not be transmitted to the complainant; and

(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.

(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency with the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

(3) If an individual does not consent to the transmission of information to the head of the agency under paragraph (2), the Special Counsel shall—

(A) return any documents and other matter provided by the individual who made the disclosure; and

(B) inform the individual of—

(i) the reasons that the disclosure may not be further acted on under this chapter; and

(ii) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

(h)(1) Subject to paragraph (2), the identity of any employee, former employee, or applicant for employment who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without the consent of the employee, former employee, or applicant. Unless the Special Counsel determines that the disclosure of the identify of the employee, former employee, or applicant is necessary in order to carry out the functions of the Special Counsel.

(2) The identity of any employee, former employee, or applicant for employment whose disclosure (as described in subsection (a)) is not further acted upon under subsection (g)(3), may not be disclosed without the consent of such employee, former employee, or applicant

for employment, except where necessary for reasons of public health and safety or law enforcement.

(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

(1) specifically prohibited from disclosure by any other provision of law; or

(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(k) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsection (c), together with reports by the heads of agencies under subsection (c)(1)(B) relating to such matters. The Special Counsel shall take steps to ensure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

§ 1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

(i) within 60 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(2)(A) If the Special Counsel terminates any investigation under paragraph (I), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person; and

(iii) the reasons for terminating the investigation.

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee or applicant seeks corrective action for prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and—

(A) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; or

(B) ninety days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred exists, or is to be taken.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Satur-

days, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board may allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

(i) on a motion of the Board or a motion of any agency, unless notice and opportunity for a hearing are first provided to the Special Counsel and the individual on whose behalf of stay was ordered; or

(ii) on motion of the Special Counsel, unless a notice and opportunity for a hearing are first provided to the individual on whose behalf the stay was ordered.

(2)(A) If, in connection with any investigation the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(B) If the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(C) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice that the agency has acted to correct the prohibited personel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(3)(A) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

(i) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(ii) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, as described under paragraphs (1) through (7), and (9) through (11) of section 2302(b) has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against the individual. The Special Counsel may demonstrate that the disclosure was a factor in the personnel action by showing that—

(I) the official taking the personnel action knew of the disclosure; and

(II) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.

(ii) Corrective action under clause (i) may not be ordered if the agency demonstrate by clear and convincing evidence that—

(I) the personnel action involved is justified on a basis independent of the disclosoure referred to in clause (i); and

(II) the disclosure was not a material factor in the personnel action.

(c)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel has discretion as to whether to proceed.

(d) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (c), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(e) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(f) Nothing in this section shall preclude an individual from seeking corrective action from the Board under section 1221.

§ 1215. Disciplinary action

(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—

(A) committed a prohibited personnel practice,

(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or

(C) knowingly and willfully refused or failed to comply with an order of the Merit System Protection Board.

the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—

(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(B) be represented by an attorney or other representative;

(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

(D) have a transcript kept of any hearing under subparagraph (C); and

(E) a writtern decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).

(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

(b) In the case of an employee in a confidential policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

(c)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the Federal agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (I), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

§ 1216. Other matters within the jurisdiction of the Office of Special Counsel

(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning—

(1) political activity prohibited under subchapter III of chapter 73, relating to political activities by Federal employees;

(2) political activity prohibited under chapter 15, relating to political activities by certain State and local officers and employees;

(3) arbitrary or capricious withholding of information prohibited under section 552, except that the Special Counsel shall make no investigation of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrustion in personnel decisionmaking; and

(5) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

(b) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraphs (4) and (5) of subsection (a), if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

§ 1217. Transmittal of information to Congress

Nonwithstanding any other provision of law or any rule; regulation, or policy directive, the Special Counsel or any employee of the Special Counsel designated by the Special Counsel, may transmit to the Congress on the request of any committee or subcommittee, thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Office, without review, clearance, or approval by any other administrative authority.

§ 1218. Annual report

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CASES INVOLVING PROHIBITED PERSONNEL PRACTICES

§ 1221. Individual right of action

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (b), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee, former employee, or applicant for employment may demonstrate that the disclosure was a factor in the personnel action by showing that—

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.

(2) Corrective action under paragraph (1) shall not be ordered if the agency demonstrates by clear and convincing evidence that—

(A) the personnel action involved is justified on a basis independent of the disclosure referred to in paragraph (1); and

(B) the disclosure was not a material factor in the personnel action.

(f) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(g) If an employee, former employee, or applicant for employment is the prevailing party, and the decision is based on a finding of a prohibited personnel practice, the agncy involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other costs incurred.

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section or section 1214 may obtain judicial review of the order of decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

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Section 2302. Prohibited personnel practices

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(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

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(8) take or fail to take *or threaten to take or fail to take* a personnel action with respect to any employee or applicant for employment **[**as a reprisal for**]** *because of*—

(A) **[**a disclosure**]** *any disclosure* of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) *gross* mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Ex-

ecutive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) [a disclosure] *any disclosure* to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) *gross* mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

[(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;]

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A); or

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law.

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Section 2303. Prohibited personnel practices in the Federal Bureau of Investigation

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(c) The President shall provide for the enforcement of this section in a manner consistent with the provisions of section [1206] *1215* of this title.

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§ 3352. Preference in transfers for employees making certain disclosures

(a) Subject to the provisions of subsections (d) and (e), in filling a position within any Executive agency, the head of such agency may give preference to any employee of such agency, or any other Executive agency, to transfer to a position of the same status and tenure as the position of such employee on the date of applying for a transfer under subsection (b) if—

(1) such employee is otherwise qualified for such position;

(2) such employee is eligible for appointment to such position; and

(3) the Merit Systems Protection Board makes a determination under the provisions of chapter 12 of this title that a prohibited personnel action described under section 2302(b)(8) of this title was taken against such employee.

(b) An employee who meets the conditions described under subsection (a) (1), (2), and (3) may voluntarily apply for a transfer to a position, as described in subsection (a), within the Executive agency employing such employee or any other Executive agency.

(c) If an employee applies for a transfer under the provisions of subsection (b) and the selecting official rejects such application, the selecting official shall provide the employee with a written notification of the reasons for the rejection within 30 days after receiving such application.

(d) An employee whose application for transfer is rejected under the provisions of subsection (c) may request the head of such agency to review the rejection. Such request for review shall be submitted to the head of the agency within 30 days after the employee receives notification under subsection (c). Within 30 days after receiving a request for review, the head of the agency shall complete the review and provide a written statement of findings to the employee and the Merit Systems Protection Board.

(e) The provisions of subsection (a) shall apply with regard to any employee—

(1) for no more than 1 transfer;

(2) for a transfer from or within the agency such employee is employed at the time of a determination by the Merit Systems Protection Board that a prohibited personnel action as described under section 2302(b)(8) of this title was taken against such employee; and

(3) no later than 18 months after such a determination is made by the Merit Systems Protection Board.

(f) Notwithstanding the provisions of subsection (a), no preference may be given to any employee applying for a transfer under subsection (b), with respect to a preference eligible (as defined under section 2108(3) of this title) applying for the same position.

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Section 3393. Career appointments

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(g) A career appointee may not be removed from the Senior Executive Service or civil service except in accordance with the applicable provisions of sections [1207] *1215,* 3592, 3595, 7532, or 7543 of this title.

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Section 7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section [1206] *1215* of this title.

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Section 7512. Actions covered

This subchapter applies to—

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(E) an action initiated under section [1206] *1215* or 7521 of this title.

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Section 7521. Actions against administrative law judges

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(b) The actions covered by this section are—

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but do not include—

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(C) any action initiated under section [1206] *1215* of this title.

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Section 7542. Actions covered

This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section [1206] *1215* of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title.

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Section 7701. Appellate procedures

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(b)*(1)* The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

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Section 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

[(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.**]**

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in **[**paragraph (2)**]** *paragraphs (2) and (3)* of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

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(3) A petition to review a final order or final decision of the Board involving a prohibited personnel practice as described under section 2302(b)(8) of this title may be filed in the United States Court of Appeals for the Federal circuit or a United States court of appeals for the judicial circuit within which the petitioner resides.

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FOREIGN SERVICE ACT OF 1980

Section 1109. Relationship to other remedies

(a) A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or Executive order, other than under section

[1206] *1214 or 1221* of Title 5, and the matter has been carried to final decision under such provision on its merits or is still under consideration.

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